District Court Judges' Bench Book

Revised 2010

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CIVIL COURT CASEFLOW MANAGEMENT

Effective caseflow management is the essential business of the court. Early court intervention and continuous management of the progress of each case is permanent. Early management and tracking initiates after a case is filed, assigned a cause number and system entry occurs, including caption, names of the parties, type of case, attorney names, and implementation of case event scheduling.

It is critical at the outset and for the duration of the life of the case to always schedule a monitored date by which some defined event must next occur.

Obtain from the Montana Supreme Court Administrator all necessary information, resources and technical staff to assist and assure each court as well as clerk of court has the equipment, software, and training to event calendar and track each case. Utilize a system to differentiate cases in categories among routine cases, complex cases, small cases and pro se cases, etc. While the number of case tracking categories and methodology of case tracking is specific to the preferences of each judge, a systematic approach must be utilized.

The twin keys to the court's case tracking system are to (1) identify when a case requires judicial attention, and (2) establish specific dates when a defined event will occur. Forms which assist to manage and accomplish these tasks, for both civil and criminal cases include:

Rule 16(b) Order
Case Scheduling Order (settlement master option)
Order Appointing Settlement Master & Scheduling of Settlement Conference
Order to Show Cause
Jury Trial Preparation Order
Non-Jury Trial Preparation Order
Order Directing that Trial Jury be Drawn and Summoned

For civil cases, coordinate with the Clerk of Court to notify the judge to oversee issuance of a Case Scheduling Order after each of the parties has been served, and the times(s) for filing answers to the complaint, counterclaim or cross-claim has run. Issue the Rule 16(b) with the formatted Case Scheduling Order. Issuance may involve a conference call to, or in-chambers appearance of the parties/attorneys, or an opportunity for the attorneys to agree by stipulation, or the court setting the event time frame *sua sponte*. Utilize conference calls, status hearings, filed status reports, summary judgment hearings, or order to show cause, as warranted for each case. Utilize the UDCR Rule 2 timelines for tracking motions and briefing schedules. **Note**: Set a firm trial date either when the Rule 16(b) M.R.Civ.P. scheduling order is entered or after a Settlement Master's Report is filed indicating the case failed to settle, the parties' estimate of trail length, unavailable trial dates, special trial needs, etc.

Issue a Jury Trial or Non-Jury Trial Preparation Order.

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

_____,	Cause No. _____
Plaintiff(s),	
vs.	
_____,	**RULE 16(b) ORDER**
Defendant(s).	

In order to enable the Court to issue the scheduling order required by Rule 16(b), M.R.Civ.P., the attorney for the Plaintiff(s) is directed to consult with the attorney for the opposing party(ies) and any unrepresented party(ies) and thereafter file with the Court the attached proposed Case Scheduling Order.

Counsel are to agree upon a Settlement Master and consult and arrange a date for a Settlement Conference with said Master, and state such arrangement in the proposed Case Schedule. The Court will then issue an Order setting out the settlement conference procedures in this matter.

Unless other arrangements are made, the fee charged by the Settlement Master will be shared equally by the parties. The case will not be set for trial or final hearing until a Status Report is filed with the Court from the Settlement Master.

If a completed proposed Case Scheduling Order is not filed within thirty (30) days of the date of this Order the Court will issue a scheduling order *sua sponte*.

DATED this _____ day of _____, 20_____.

_____
HON. _____, District Judge

cc: Plaintiff's Attorney
Defendant's Attorney

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

_____, Plaintiff(s), vs. _____, Defendant(s).	Cause No. _____ **CASE SCHEDULING ORDER**

Preliminary Note: Discovery shall be completed and filed within three (3) months of the date of this Order unless, for good cause shown, the Court allows a longer period. If no discovery is anticipated, counsel may return the attached memorandum for scheduling of an immediate pretrial conference.

1. On or before _____: All parties are to be joined and all amendments to the pleadings are to be filed.

2. On or before _____: Names and addresses of Plaintiff's expert witnesses together with the information described in Rule 26(b)(4)(A)(i), M.R.Civ.P., must be furnished to Defense counsel on or before this date.

3. On or before _____: Names and addresses of Defendant's expert witnesses together with the information described in Rule 26(b)(4)(A)(i), M.R.Civ.P., must be furnished to Plaintiff's counsel on or before this date.

4. On or before _____: All discovery in this matter shall be completed on this date; i.e., all responses to discovery shall be due on or before this date.

5. On or before _____: Exchange exhibits and final witness lists.

ESTABLISHING DEADLINES FOR THE IDENTIFICATION OF EXPERT WITNESSES, WITNESSES AND EXHIBITS DOES NOT SUPERSEDE THE REQUIREMENT OF ALL PARTIES TO FAIRLY AND ACCURATELY RESPOND TO OTHER DISCOVERY. THAT IS TO SAY, BY ESTABLISHING THESE DEADLINES, IT IS NOT INTENDED THAT THE PARTIES CANNOT IDENTIFY EXPERTS, WITNESSES, OR EXCHANGE EXHIBITS IN RESPONSE TO OTHER DISCOVERY BY CLAIMING THAT THE EXCHANGE OF INFORMATION IS NOT DUE UNTIL THE DEADLINES ESTABLISHED BY THIS ORDER. ALL DISCOVERY IS TO BE FAIRLY AND ACCURATELY RESPONDED TO AND FAILURE TO DO SO MAY RESULT IN APPROPRIATE SANCTIONS.

6. On or before _____: All pretrial motions, including motions in limine and motions for summary judgment, along with supporting briefs, shall be filed and served on opposing counsel on or before this date. Filing of answer briefs and reply briefs shall comply with the schedule provided by Rule 2(a) of the Uniform District Court Rules.

7. On or before _____: Hearings on motions or submission of the motions on briefs shall be accomplished by this date. It shall be the responsibility of the moving party to advise the Court either that the motions are submitted on briefs or to request a hearing in accordance with Rule ___ of the Local Rules of the ____ Judicial District.

8. There shall be no changes in this Scheduling Order absent Court order upon showing of good cause. All motions for continuance shall be submitted in writing, supported by affidavit, and shall bear the signatures of the parties.

9. On or before _____: A Special Settlement Master shall be jointly nominated, as provided in Rule ____ of the Local Rules.

10. On or before _____: A settlement conference shall be held before _____, Special Settlement Master, as provided in Rule ___ of the Local Rules, by this date. The Settlement Master shall submit a report to the Court within five (5) days of completion of the conference. Counsel shall advise the Settlement Master and the Settlement Master shall include in the report to the Court the anticipated length of trial and the dates the parties or key witnesses are unavailable for trial. No case will be set for trial unless a master-

supervised settlement conference has been held. In the event a trial setting is necessary, the Court will issue a final scheduling/trial preparation order *sua sponte* upon receipt of the settlement master's report.

DATED this _____ day of _____, 20_____..

Approved:_____ _____
Counsel for Plaintiff(s) _____, District Judge

Approved:_____
Counsel for Defendant(s)

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

_____, Plaintiff, vs. _____, Defendant.	Cause No. _____ **ORDER APPOINTING SETTLEMENT MASTER AND SCHEDULING OF SETTLEMENT CONFERENCE**

IT IS HEREBY ORDERED that _____, Esq. is appointed as Settlement Master in the above-entitled cause. A Settlement Conference in this cause is to be held on or before _____. Unless other arrangements are made in advance with the Settlement Master, the fee charged by the Settlement Master at a rate to be negotiated on a case by case basis will be shared equally by the parties. The Settlement Master shall submit a report to the Court within five (5) days of completion of the conference. The mandatory guidelines for Settlement Conference preparation are as follows:

1. The purpose of the Settlement Conference is to permit an informal discussion among the attorneys, parties, non-party indemnitors or insurers, and the Settlement Master of

every aspect of the lawsuit bearing on its settlement potential, thus permitting the Settlement Master to candidly express views concerning the settlement value of the parties' claims. All communications made in connection with the Settlement Conference are confidential and will not be disclosed to non-participating individuals. Statements or communications of any kind occurring during the Settlement Conference shall be deemed inadmissible in court pursuant to Rule 408, Montana Rules of Evidence.

2. Counsel who will actually try the case shall attend the conference. All named parties shall attend in person with authority to settle. Counsel shall appear with their clients whether or not counsel have been given ultimate settlement authority.

3. If a corporation is a named party, a representative thereof shall attend the conference in person. This representative must have ultimate authority, in the representative's discretion, to commit the corporation to terms of settlement. If Board approval is required to authorize settlement, the entire Board should attend. For such cases the attendance of at least one sitting Board member (preferably the Chairman) is required.

4. Any insurance company or indemnitor that is a named party or is contractually required to defend or liable to pay damages, if any, or is otherwise involved in the case shall have a representative attend the conference in person or by speaker phone unless otherwise ordered. Counsel for Plaintiff(s) may apply to the Court to require the personal attendance of said representative, and any such application is likely to be viewed with favor if the claim is of a substantial nature or if there are potential excess liability concerns, or other such special considerations. This representative must have full authority, in the representative's discretion, to commit the company to terms of settlement within the applicable policy limits or at least up to

the Plaintiff's last demand.

5. It is the responsibility of counsel to timely advise all named parties and involved insurance carriers or indemnitors of this conference and to ensure the personal attendance of the required individuals or representative by telephone. Requests to excuse personal attendance will not be entertained without exceptional justification.

6. Prior to the Settlement Conference the attorneys are directed to discuss settlement with their clients and insurance representatives and encouraged to discuss settlement with the opposing counsel.

7. A Settlement Conference statement from each party together with a Settlement Master fee deposit to be negotiated from each participating party must be submitted directly to the office of the Settlement Master no later than three business days prior to the conference. The statement may not exceed five pages in length and should contain:

a) The background of the case;
b) Factual and legal issues, including damages;
c) Points and authorities of law;
d) A description of the strongest and weakest points in their case, both legal and factual, and that of their opponents; and
e) The history of settlement negotiations, including a recitation of any specific offers and demands.

Discovery materials or evidence that will be offered at trial may be attached, in the discretion of counsel. The settlement statement <u>shall not</u> be filed with the Court or exchanged with or disclosed to opposing counsel. The settlement statement will be returned to the submitting party or destroyed at the close of the conference.

8. The parties shall pay the balance of the Settlement Master's fees within <u>twenty (20) days</u> following the conference, and the Master shall notify the Court of any

unpaid balance due to the Master so that the balance can be addressed prior to final disposition of the case. FAILURE TO PROMPTLY PAY SETTLEMENT MASTER FEES CAN RESULT IN ENTRY OF A JUDGMENT OR ISSUANCE OF A CITATION FOR CONTEMPT OF COURT.

9. The Settlement Master is authorized to cancel and/or reschedule the conference due to failure of either party to pay the required fee, failure to file an adequate Settlement Conference statement, failure of counsel to appear with the client, failure to appear substantially prepared to participate in the conference, or failure of either party or respective counsel to participate in the conference in good faith. The noncomplying attorney and/or party may be assessed the costs and expenses incurred by the other individuals involved due to the cancellation, and other sanctions may be imposed in the discretion of the District Judge.

DATED this _____ day of _____, 20____.

_____
_____, District Judge

cc: Plaintiff's Attorney
Defendant's Attorney
_____, Esq., Settlement Master

SETTLEMENT MASTER REPORT
(Civil)

TO: Clerk of District Court
_____ Courthouse

The undersigned, having served as Settlement Master, reports as follows:

DOCKET NO. _____

NAME OF CASE _____

SETTLEMENT MASTER _____
PLAINTIFF COUNSEL _____
DEFENDANT COUNSEL _____

OTHER PARTICIPANTS ATTENDING _____

DATE & TIME OF CONFERENCE _____

TIME SPENT: Hours Billed _____

RESULT (check one): Case settled at conference Yes _____ No _____
Prospect for settlement Good _____ Poor _____

SPECIAL TRIAL CONSIDERATIONS (if any):

ESTIMATED TRIAL TIME NEEDED TO PRESENT CASE: Plaintiff: _____
Defendant: _____

DATES NOT AVAILABLE FOR TRIAL: _____

DATED this ____ day of _____, 2008.

_____
Settlement Master

cc: Attorneys of Record

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

_____, Plaintiff, vs. _____, Defendant.	Cause No. _____ **ORDER TO SHOW CAUSE**

Pursuant to Rules 16(f) and 37(b)(2)(C) of the Montana Rules of Civil Procedure, it appearing to the Court that this action has not been prosecuted with due or reasonable diligence,

IT IS HEREBY ORDERED that all counsel of record and any unrepresented party appear before this Court at the courtroom hereof on _____, or as soon thereafter as the matter may be heard, and then and there show cause, if any there be, why an order should not be entered dismissing this action without prejudice.

IT IS FURTHER ORDERED that counsel and any unrepresented parties shall be excused from attendance at said hearing if an appropriate stipulation or notice of dismissal and a proposed order of dismissal are presented to the Court prior to the date hereby set for the hearing.

The Clerk of this Court is hereby directed to serve a copy of this order on all counsel of record herein and upon any unrepresented party at their last known address by first class mail.

DATED this _____ day of _____, 20_____.

_____

_____, District Judge

cc: Counsel of record

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

_____, Plaintiff(s), vs. _____, Defendant(s).	Cause No. _____ **JURY TRIAL PREPARATION ORDER**

It appearing to the Court that this cause has proceeded through settlement conference and remains unresolved and ready for trial,

IT IS ORDERED that the following scheduling deadlines are hereby established and shall supersede all prior scheduling orders herein:

THIS MATTER IS HEREBY SET FOR JURY TRIAL COMMENCING **_____, _____, _____ a.m. / p.m., _____ Setting,** WITH A JURY OF TWELVE (12) PERSONS AT THE _____ COUNTY COURTHOUSE, _____, MONTANA. Trial time is limited not to exceed _____ day(s), and the Court reserves the power to set time limits on jury selection, opening and closing statements, and presentation of testimony, as may be necessary.

There shall be no modifications to this order absent further order of this Court upon showing of good cause. Any motion for continuance or postponement shall be submitted in writing, supported by affidavit, and bear the signature of counsel.

1. ***Six Weeks***: On or before this date Plaintiffs' proposed Pretrial Order shall be prepared and submitted to Defendants' counsel, pursuant to Rule 5, U.D.C.R.

2. ***Four Weeks***: On or before this date Defendants' proposed Pretrial Order shall be prepared and submitted to Plaintiffs' counsel, pursuant to Rule 5, U.D.C.R.

3. ***Two weeks***: On or before this date the Final Pretrial Order shall be submitted to the Court for approval.

4. ***PPTC Date/Time***: On this date the Court will hold a preliminary pretrial conference with counsel in chambers.

TRIAL GUIDELINES

On the first day of trial, counsel are expected to be present **at 8:30 a.m.** in chambers for ***final*** pretrial conference. At that time the Court will be available for any unresolved preliminary matters. The first trial day will begin at 9:30 a.m., with the luncheon recess at 12:00 noon. Trial will resume at 1:30 p.m. and will run to 5:00 p.m. Trial will resume at 8:30 a.m. or 9:00 a.m. as the Court may direct on any subsequent trial days. There will ordinarily be a fifteen minute mid-morning recess and a twenty minute mid-afternoon recess each trial day.

Requests for special Court services or arrangements should be made well in advance of the trial date. If you have any questions, call the District Court Administrator, _____ at (406) _____.

It is the responsibility of counsel to notify the District Court Administrator well in advance of the date if they desire to use electronic courtroom technology during this trial.

Thank you for your cooperation in working with each other to achieve the common

objective of a fair trial.

CHECKLIST FOR PRETRIAL CONFERENCES AND TRIAL

A. **Exhibit Lists:** Each party shall prepare an index of exhibits which they expect to offer, using the attached form. Provide two copies for the Court at the preliminary pretrial conference and a copy for opposing counsel and any unrepresented party. (There is no requirement to offer exhibits in sequence.)

B. **Exhibits:** Each party shall affix printed exhibit labels to their exhibits before the preliminary pretrial conference, legibly marked with the exhibit number or letter and the cause number. Plaintiff/Petitioner's exhibits should be marked in numerical sequence; Defendant/Respondent's exhibits in alphabetical sequence. If there are more than twenty-six exhibits for the Defendant/Respondent, mark them "AA", "BB", etc. Counsel shall keep in mind exhibits that may be grouped together for easy reference. Oversize exhibits must be detachable from any mounting for storage by the Clerk of Court following the trial. Photographs should be submitted in clear plastic sleeves and each should be individually identified by label, for example, Exhibit 2-A, 2-B, etc.

C. **Exhibit Books:**

(1) It is expected that prelabeled and marked documentary exhibits, bound as hereinafter set forth, shall be deposited with the Court at or before the pretrial conference. These shall be the official exhibits used by witnesses during the trial and made part of the official trial record for appeal purposes.

(2) It is further expected that photocopies of each prelabeled documentary exhibits, bound as hereinafter set forth shall be provided to each opposing counsel, any unrepresented party, and to the presiding judge at the same time. These will be for the personal use and note taking by each of those individuals during trial.

(3) The official exhibits and all copy sets shall be punched and bound in ring binders and index-tabbed by letter or number corresponding to each exhibit using the exhibit lists as a table of contents. Sensitive documents/photographs not susceptible to punching should be submitted in ring punched plastic sleeves.

(4) Counsel and unrepresented parties are expected to review all proposed exhibits prior to the date of trial and to be prepared to make a record of any stipulations to proposed exhibits at the time of the final pretrial conference immediately prior to the commencement of trial.

D. **Jury Instructions:** Prior to the preliminary pretrial conference the parties are directed to confer with one another regarding proposed jury instructions and verdict form. On or

before the date of the preliminary pretrial conference counsel shall submit one joint set of jury instructions by stipulation and one separate set per party of those proposed instructions not agreed upon, consisting of an original and one working copy of each such instruction. The working copy shall indicate the party on whose behalf it is requested, be numbered consecutively, contain reference to the source thereof, and a citation of authority, if any, supporting the statement of law contained therein. Brief written objections to the opposing party's supplemental proposed instructions containing citations to appropriate authority and legal arguments shall be submitted at or before the ***final*** pretrial conference on the morning of trial. Oral arguments regarding contested instructions shall be heard during final settlement of the instructions.

E. **Witnesses:** Counsel shall provide the Court with three (3) copies of a list of their respective witnesses at the preliminary pretrial conference, using the attached form. One copy will be given to the Court Reporter to avoid asking the spelling of the witness' names. It is the obligation of counsel to have their witnesses available to prevent any delay in the presentation of testimony or running out of witnesses before 5:00 p.m. on any trial day. If counsel has a problem in this regard, it should be promptly brought to the Court's attention at the pretrial conference.

F. **Voir Dire:** Pursuant to Local Rule 13, the length and conduct of voir dire examination **shall not exceed one (1) hour per side** without prior leave of the Court.

G. **Terminology:** Counsel shall prepare a glossary of any unusual or technical terminology and provide it to the Court Reporter prior to trial.

H. **Depositions:** If deposition testimony will be used, counsel shall advise opposing counsel of such proposed offer by page and line reference to enable the preparation of objections and the offer of additional portions. Written objections and evidentiary grounds must be filed with the Court prior to the preliminary pretrial conference. Counsel is also required to provide a person (co-counsel or someone other than Court staff) to read the answers.

I. **Audio-Visual Equipment:** If you intend to use any special equipment, such as slides, overhead projectors, or tape recorders, you are requested to make the appropriate arrangements at least five (5) business days prior to the date of the trial and to advise the Clerk of District Court. The Court has a white dry erase board and an oversize video monitor in the courtroom to display VHS video tapes.

J. **Pretrial Motions:** All motions must be fully briefed and set for hearing by arrangement with the Court Administrator at least ten (10) business days prior to trial. No pretrial motions will be heard on the morning of trial absent extraordinary circumstances.

K. **Expert Witnesses:** Counsel shall furnish opposing counsel with any final reports of experts anticipated to testify at or prior to the preliminary pretrial conference and in conjunction with the schedule as set forth in the Case Scheduling Order.

L. **Oversize Exhibits:** If counsel intend to use oversize diagrams or large exhibits it is preferred that they be prepared before trial and placed on the display board or otherwise mounted for display in the courtroom during recesses to best utilize available time. File size copies of oversize exhibits shall be made for the members of the jury, Court, and the opposing party. Dry erase board illustrations are discouraged since they cannot be preserved for the appellate record.

M. **Final Argument:** Final Argument shall be based on the assumption that the Court and jury have listened to the evidence, and shall be commensurate with the length of the trial and complexity of the issues.

DATED this _____ day of _____, 20____.

_____

_____, District Judge

cc: Plaintiff's Attorney
Defendant's Attorney

MONTANA _____JUDICIAL DISTRICT
_____COUNTY, STATE OF MONTANA

_____

_____ Cause No. _____
Plaintiff(s)/Petitioner

vs./and

_____

_____ Date:_____
Defendant(s)/Respondent

RECORD OF EXHIBITS

___ Plaintiff(s)'/Petitioner's (numerical) _____ Defendant(s)'/Respondent's (alphabetical)

Ex. No.	Description	Stipu-lated	Objec-tion	Basis for Objection	Response to Objection

MONTANA _____ JUDICIAL DISTRICT
_____ COUNTY, STATE OF MONTANA

_____

_____ Cause No. _____
Plaintiff(s)/Petitioner

vs./and

_____

_____ Date:_____
Defendant(s)/Respondent

LIST OF WITNESSES

___ Plaintiff(s)'/Petitioner's _____ Defendant(s)'/Respondent's

NAME OF WITNESS	NAME OF WITNESS

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

_____, Plaintiff(s), vs. _____, Defendant(s).	Cause No. _____ **NON-JURY TRIAL PREPARATION ORDER**

It appearing to the Court that this cause has proceeded through settlement conference and remains unresolved and ready for trial,

IT IS ORDERED that the following scheduling deadlines are hereby established and shall supersede all prior scheduling orders herein:

THIS MATTER IS HEREBY SET FOR NON-JURY TRIAL COMMENCING: **(day/date, time, setting #**, AT THE _____ COUNTY COURTHOUSE, _____, MONTANA. Trial time is limited not to exceed _____ days and the Court reserves the power to set time limits on presentation of testimony as may be necessary.

There shall be no modifications to this order absent further order of this Court upon showing of good cause. Any motion for continuance or postponement shall be submitted in writing, supported by affidavit, and bear the signature of counsel.

1 wk before trial and time of day: Counsel for all represented parties and any unrepresented parties are directed to personally appear at Judge's Chambers for purposes of a preliminary pretrial conference. At or before the conference, each party shall submit to the Court an original and one copy of each party's Proposed Findings of Fact and Conclusions of Law and serve same on opposing counsel together with a diskette formatted for Word or WP 6.0 and higher.

TRIAL GUIDELINES

On the first day of trial, counsel are expected to be present at least one-half hour before the trial is scheduled to begin for ***final*** pretrial conference. At that time the Court will be available for any unresolved preliminary matters. The first trial day will begin at 9:00 a.m., with the luncheon recess at 12:00 noon. Trial will resume at 1:30 p.m. and will run to 5:00 p.m. Trial will resume at 8:30 a.m. or 9:00 a.m. as the Court may direct on any subsequent trial days. There will ordinarily be a twenty minute mid-morning recess and a twenty minute mid-afternoon recess each trial day.

Requests for special Court services or arrangements should be made well in advance of the trial date. If you have any questions, call the District Court Administrator, _____, at (406) _____.

It is the responsibility of counsel to notify the District Court Administrator well in advance of the date if they desire to use electronic courtroom technology during this trial.

Thank you for your cooperation in working with each other to achieve the common objective of a fair trial.

CHECKLIST FOR PRETRIAL CONFERENCES AND TRIAL

A. **Exhibit Lists:** Each party shall prepare an index of exhibits which they expect to offer, using the attached form. Provide two copies for the Court at the preliminary pretrial conference and a copy for opposing counsel and any unrepresented party. (There is no requirement to offer exhibits in sequence.)

B. **Exhibits:** Each party shall affix printed exhibit labels to their exhibits before the preliminary pretrial conference, legibly marked with the exhibit number or letter and the cause number. Plaintiff/Petitioner's exhibits shall be marked in numerical sequence; Defendant/Respondent's exhibits in alphabetical sequence. If there are more than twenty-six exhibits for the Defendant/Respondent, they shall be marked "AA", "BB", etc. Counsel shall keep in mind exhibits that may be grouped together for easy reference. Oversize exhibits must be detachable from any mounting for storage by the Clerk of Court following the trial. Photographs should be submitted in clear plastic sleeves and each should be

individually identified by label, for example, Exhibit 2-A, 2-B, etc.

C. **Exhibit Books:**

(1) It is expected that prelabeled and marked documentary exhibits, bound as hereinafter set forth, shall be deposited with the Court at or before the pretrial conference. These shall be the official exhibits used by witnesses during the trial and made part of the official trial record for appeal purposes.

(2) It is further expected that photocopies of each prelabeled documentary exhibits, bound as hereinafter set forth shall be provided to each opposing counsel, any unrepresented party, and to the presiding judge at the same time. These will be for the personal use and note taking by each of those individuals during trial.

(3) The official exhibits and all copy sets shall be punched and bound in ring binders and index-tabbed by letter or number corresponding to each exhibit using the exhibit lists as a table of contents. Sensitive documents/photographs not susceptible to punching should be submitted in ring punched plastic sleeves.

(4) Counsel and unrepresented parties are expected to review all proposed exhibits prior to the date of trial and to be prepared to make a record of any stipulations to proposed exhibits at the time of the final pretrial conference immediately prior to the commencement of trial.

D. **Witnesses:** Counsel shall provide the Court with three (3) copies of a list of their respective witnesses at the preliminary pretrial conference using the attached form. One copy will be given to the Court Reporter to avoid asking the spelling of the witness' names. It is the obligation of counsel to have their witnesses available to prevent any delay in the presentation of testimony or running out of witnesses before 5:00 p.m. on any trial day. If counsel has a problem in this regard, it should be promptly brought to the Court's attention at the pretrial conference.

E. **Terminology:** Counsel shall prepare a glossary of any unusual or technical terminology and provide it to the Court Reporter prior to trial.

F. **Written Curriculum Vitae:** A written curriculum vitae, marked as an exhibit, will usually suffice for the qualifications of expert witnesses.

G. **Depositions:** If deposition testimony will be used, counsel shall advise opposing counsel of such proposed offer by page and line reference to enable the preparation of objections and the offer of additional portions. Written objections and evidentiary grounds must be filed with the Court prior to the preliminary pretrial conference. Counsel is also required to provide a person (co-counsel or someone other than Court staff) to read the answers.

I. **Audio-Visual Equipment:** If you intend to use any special equipment, such as slides, overhead projectors, or tape recorders, you are requested to make the appropriate arrangements at least five (5) business days prior to the date of the trial and to advise the Clerk of District Court. The Court has a white dry erase board and an oversize video monitor in the courtroom to display VHS video tapes.

J. **Pretrial Motions:** All motions must be fully briefed and set for hearing by arrangement with the Court Administrator at least ten (10) business days prior to trial. No pretrial motions will be heard on the

morning of trial absent extraordinary circumstances.

K. **Settlement Conferences:** If counsel feel that an additional settlement conference will assist in resolving the case, they should contact the Court as soon as possible. Counsel should not waste their or the Court's time if an additional settlement conference will have no value.

L. **Expert Witnesses:** Counsel shall furnish opposing counsel with a final report of experts anticipated to testify at or prior to the preliminary pretrial conference and in conjunction with the schedule as set forth in the Case Scheduling Order.

M. **Stipulations:** Stipulations shall be placed on the record ***before*** the opening statement by Plaintiff's counsel. This is especially helpful in marital dissolution cases so the Court is aware of what issues have been resolved and is prepared to anticipate questions of relevancy.

N. **Oversize Exhibits:** If counsel intend to use oversize diagrams or large exhibits, it is preferred that they be prepared before trial and placed on the display board or otherwise mounted for display in the courtroom during recesses to best utilize available time. File size copies of oversize exhibits shall be made for the Court and the opposing party. Dry erase board illustrations are discouraged since they cannot be preserved for the appellate record.

DATED this _____ day of _____, 20_____.

_____

_____, District Judge

cc: Plaintiff's Attorney
Defendant's Attorney

MONTANA _____ JUDICIAL DISTRICT
_____ COUNTY, STATE OF MONTANA

_____

_____
Plaintiff(s)/Petitioner

vs./and Cause No. _____

_____

_____
Defendant(s)/Respondent

Date:_____

RECORD OF EXHIBITS

___ Plaintiff(s)'/Petitioner's (numerical) _____ Defendant(s)'/Respondent's (alphabetical)

Ex. No.	Description	Stipu-lated	Objec-tion	Basis for Objection	Response to Objection

MONTANA _____ JUDICIAL DISTRICT
_____ COUNTY, STATE OF MONTANA

_____

_____
Plaintiff(s)/Petitioner

vs./and Cause No. _____

_____

_____
Defendant(s)/Respondent

Date:_____

LIST OF WITNESSES

___ Plaintiff(s)'/Petitioner's _____ Defendant(s)'/Respondent's

NAME OF WITNESS	NAME OF WITNESS

MONTANA _____ JUDICIAL DISTRICT COURT, _____ COUNTY

_____, Plaintiff, vs. _____, Defendant	Cause No. _____ **ORDER DIRECTING THAT TRIAL JURY BE DRAWN AND SUMMONED**

To the Clerk of District Court:

The above-entitled matter being at issue and ready for trial and the attendance of a trial jury being necessary for a trial of _____ day(s), commencing on the _____ day of _____, now therefore, pursuant to §3-15-501, M.C.A.,

IT IS ORDERED that you shall forthwith draw and summon a trial jury panel of _____ jurors by serving a notice by mail on the persons drawn and that you require the persons to respond by mail to acknowledge receipt pursuant to §3-15-405, M.C.A. Counsel of record request in the Omnibus form that the jury panel consist of ____ prospective jurors.

DATED this ____ day of _____, 20____.

_____
_____, District Judge

cc: Plaintiff's Attorney
Defendant's Attorney

JUDGE'S CHECKLIST -- Pre-Trial Conference

PRE-TRIAL CHECKLIST

1. Pretrial date: _____

2. Trial date (final pretrial): _____

3. Settlement Conference: _____

4. Attorneys: Plaintiff: _____
   Defendant: _____
   Other: _____

5. Nature of Case: _____

6. Relief/Damages requested: _____

7. Complaint filed: _____
   (j.d., parties, subject matter, issue)

8. Answer filed: _____
   (Aff. defenses, special matters)

9. Counterclaims / crossclaims: _____

10. Jury / Judge Trial - Rule 38(b), (d): _____
    Length: _____

11. Discovery issues: _____
    (Exhibits, witnesses, experts) _____

12. Pending Motions: _____

13. Evidentiary Matters: _____
    Exhibits (stipulation) _____ Foundation _____ Admissibility _____

14. Witnesses: _____

15. Amendments to pleadings: _____

16. Trial briefs (legal authorities for issues and evidence)
    Judge: Serve brief and proposed findings on court and opposing party 5 days before trial (UDCR Rule 8)
    Jury: Serve brief on court and opposing party at final pretrial conference (UDCR Rule 5)

17. Jury Instructions, 1 copy references source of authority, and verdict form

18. Consider using tailored jury questions.

_____ JUDICIAL DISTRICT COURT,
_____ COUNTY

JURY TRIAL PROCEDURE

CLERK: ____ Call roll of prospective jurors.

_____ Swear prospective jurors using the following combined oath: ***"You, and each of you, do solemnly swear or affirm that you will well and truly answer such questions as may be asked of you as to your qualifications as a trial juror during this jury term and this case in particular, so help you God."***

_____ At this time I would like to welcome the members of the jury panel, and thank you for coming. You are fulfilling your civic duty. I would like to introduce the persons on the Court's staff, _____ , Clerk, and _____, Bailiff, in whose charge you will be, _____, Court Security Officer and _____ _____, the Court Reporter.

_____ This is the time set for jury trial of Cause No. _____, wherein _____ _____ are the Plaintiffs, represented by _____ _____ and _____ is the Defendant, represented by _____.

_____ Do attorneys want voir dire reported? (Report voir dire and opening statements in all criminal cases.)

_____ Is (are) the Plaintiff(s) ready for trial?

_____ Is (are) the Defendant(s) ready for trial?

_____ In order to serve as a trial juror, you must be 18 years of age or older, a resident for at least 30 days of the state and of the city, town or county in which you are called for jury duty, a citizen of the United States, and not convicted of malfeasance in office or any felony or other high crime, the sentence of which has not yet expired or the fine not yet paid.

Are all jurors named on the most recent list of registered voters? Has any one here been convicted of malfeasance in office or any felony or other high crime? Has your sentence expired or fine been paid?

_____ Do attorneys agree that the jurors may be seated in the same order as indicated on the jury list, or do you require another random drawing to seat the jurors? [Go by 3-15-507(2), M.C.A.]

CLERK: ____ Read names of first (20+) jurors (20-civil, 24-criminal, 28-death penalty).

____ Call 3 extra jurors as prospective alternates.

BAILIFF: ____ Seat jurors in jury box and front bench, east to west. Seat prospective jurors in separate area. Excused jurors are replaced from panel in the order of their initial selection (i.e., maintain constant number of 20 [24-28] on initial panel and 3 on alternate panel).

_____ Advise of estimated time and hours of trial. Ask entire panel if any of them have any serious reasons why they can't serve, (i.e., sickness, work, vacations, etc.). See _____ .)

_____ Have attorney for Plaintiff(s) introduce self and his party(ies) and briefly explain case. Attorney for Plaintiff(s) examines and passes the initial panel for cause. (See 25-7-223, MCA, for grounds.) If challenge for cause is allowed, an additional juror is called immediately from remaining panel in the order initially selected to have full initial panel of 20 (24-28) at all times.

_____ Have attorney for Defendant(s) introduce self and his party(ies). Attorney for Defendant(s) examines and passes jurors for cause. (See 25-7-223, MCA, for grounds.) (See 46-16-115, M.C.A., for criminal trials.)

_____ "Do you feel you can set aside any bias or opinion you may have based on _____ _____ and render a fair and impartial verdict based solely on the evidence presented in court and the instruction of law I will give you?"

_____ Allow attorneys time to confer with their clients on jury selection. Select in courtroom. (Don't rewrite list unless necessary--takes too much time.)

_____ Peremptory challenges, 2 (6-person jury) or 4 (12-person jury) for civil (M.R.Civ.P.47), 6 (or 8) for criminal, and 1 for alternate. [Note: there is a special rule in cases involving multiple adverse parties that are "hostile" to one another - see 50 St.Rep. 117 (1993).]

_____ Peremptory challenges exercised by Plaintiff, then by Defendant, until the allowed peremptory challenges have been exercised or waived.

_____ The jury of 12 (or 6) is the first 12 (or 6) remaining unchallenged on the initial panel. Alternate is remaining juror. All persons not selected to move to audience section.

_____ Seat jurors in order in which their name is called.

CLERK: ____ Swear in jurors and alternate. *"You and each of you do solemnly swear or affirm that you will well and truly try the matter in issue between*_____ _____ and _____ and a true verdict render according to the evidence, so help you God."

_____ Dismiss rest of prospective jurors. Advise about next trial.

_____ Give admonishment at all recesses. *"You are admonished not to converse among yourselves or with other people, or allow yourselves to be addressed by any other person, on any subject connected with this trial; and, not to form or express any opinion on the case, or any issue of the case, until it is submitted to you." "Will counsel stipulate that all jurors are present?"*

_____ Give general pre-trial instructions when necessary. (See Section 13 of Bench Book.)

_____ Plaintiff's opening statement.

_____ Defendant's opening statement (may be reserved*).

_____ Plaintiff's case in chief.

_____ [*Defendant's opening statement (if reserved).]

_____ Defendant's case in chief.

_____ Plaintiff's rebuttal.

_____ Defendant's surrebuttal.

_____ Motions.

_____ Final settlement of final instructions in chambers (on the record).

_____ Charging the jury.

_____ Final arguments. Keep note of length or arguments. (Normally 1 hour per side. Plaintiff must use more than 2 of his or her time in the opening argument.)

_____ Case submitted to jury.

_____ Swear in Bailiffs. *"You do solemnly swear that you will keep this jury together in some private and convenient place and permit no one to communicate with them nor do so yourself unless instructed to do so by the Court, and return them into court when they have agreed upon a verdict, and ordered to do so by the Court. So help you God."*

_____ Jury will retire to the jury room with the Bailiff with the exhibits, their personal notes (if allowed), the instructions and the proposed verdict form (explain special verdict forms).

_____ Have alternate approach the bench. Alternate should be available until the verdict is rendered and remains under admonishment until the verdict is reached.

_____ Remind attorneys to keep the Court posted of their whereabouts while jury is out.

_____ Jury may come into court for further instructions. Counsel and Court Reporter must be there. (25-7-405, MCA)

_____ The Court determines all jurors are present.

CLERK: ____ Roll call of jurors.

_____ "Ladies and gentlemen of the jury, have you reached a verdict? Has the verdict been signed by the foreperson?" (Have foreperson identify himself/herself.) "Please give it to the Bailiff who will deliver it to the bench." Hand verdict to the Clerk to read. Clerk reads verdict. "Is this your verdict?"

_____ Poll the jury. "As your name is called, if this is your verdict answer 'yes'; if it is not your verdict answer 'no'."

CLERK: ____ Call roll of jurors. ("John Doe, is this your verdict?") If not unanimous, send back for further deliberations.

(For criminal trials)

_____ If Defendant is found not guilty: The Defendant is hereby discharged and the information is hereby dismissed. [Unless the Defendant is detained in connection with other charges.]

_____ If Defendant is found guilty: Defendant is adjudged guilty as found by the jury. Sentencing is hereby set for _____. Defendant shall contact the adult probation and parole officer within 24 hours to initiate a pre-sentence investigation which is hereby ordered to be performed and a report filed with the Court prior to sentencing.

PRE-JURY SELECTION

INSTRUCTION NO. 1

You have been called here today for possible selection as a juror in a civil case. Your name was randomly drawn from the list of citizens registered to vote in this county. The following remarks are intended as an outline of the selection process.

The party bringing the action is called the plaintiff. [State plaintiff's name and indicate where person or corporate representative is seated.] The plaintiff is represented by: [State name and ask to rise.] The defendant is [State defendant's name and indicate where person or corporate representative is seated.] The defendant is represented by [State name and ask to rise.] [Identify other parties and their representatives in a like manner.] From time to time throughout the trial the attorneys may be addressed as "counsel."

[State concisely the nature of the case.]

We select the jury by a process called "voir dire." The literal meaning of the term is "to speak the truth." It comes down to us from antiquity and in practice means questioning prospective jurors, under oath, to determine if they are qualified to serve.

In order to serve as a trial juror, you must be 18 years of age or older, a resident for at least 30 days of the state and of the city, town or county in which you are called for jury duty, a citizen of the United States, and not convicted of malfeasance in office or any felony or other high crime, the sentence of which has not yet expired or the fine not yet paid.

In this case we are seeking _____ jurors. They will be selected as follows: First, you will all be sworn to give true answers to all questions. The first of you will then be examined "for cause," -- that is to say, is there any cause that can be shown for challenging your qualification to serve. You might find a question asked on such an examination to be somewhat personal, even embarrassing. It is not intended to be so. It is asked because counsel believes the answer will assist in determining your qualification to serve, and for no other reason. Because the plaintiff bears the burden of proof, counsel for the plaintiff will be permitted to question you first and then the defendant's counsel may question you. If counsel believes one of you should be excused, you will be "challenged for cause." The challenge is addressed to the Court, which must decide whether the juror will be excused. If the juror is excused, he or she will be replaced by another prospective juror. This process continues until counsel for all parties have announced they "pass the jury for cause." We will at that time have a group of ___ qualified jurors. Counsel for each party may then exercise ___ "peremptory challenges" -- challenges for which no cause or reason need be given. When the parties have exercised their peremptory challenges there will remain the required ___ jurors.

You should not take a challenge for cause or a peremptory challenge personally. A juror selected for today's trial may well be excused for the next trial, and a juror excused today might well be, and frequently is, selected for the next trial.

The clerk will swear the prospective jurors.

Given: _____
District Judge

FUNCTION OF JUDGE AND JURY

INSTRUCTION NO. 2

You have been sworn as the jury to try this case. As such, your primary duty is to decide the disputed issues of fact. I will decide the questions of law that arise during the course of the trial, and, after you have received all of the evidence, I will give you, orally and in writing, instructions on the law that you are bound to follow and apply in reaching your verdict.

It is, then, your duty to hear and see clearly all of the evidence presented to you in this courtroom –- and nowhere else; to sift, measure and balance that evidence carefully; to conclude from the evidence what the true facts are; to apply the law as given to you -- and only that law -- to the facts you have found, and thereby reach a just verdict.

It is my duty to conduct the trial in an orderly, fair and efficient manner to the end that the interests of all parties can be heard and considered by you.

Let me explain briefly the general order of procedure in the trial from this point forward. First, plaintiff's counsel will make an opening statement outlining the plaintiff's case. Counsel for the defendant may then make an opening statement or reserve it until the close of the plaintiff's case. These opening statements are intended to assist you in understanding the viewpoints of the parties. Statements of counsel are not evidence.

Following the opening statements, evidence will be presented. Because the plaintiff has the burden of proof, the plaintiff's case is presented first. This is sometimes referred to as the plaintiff's "case in chief". Counsel for the defendant has aright to cross-examine the plaintiff's witnesses.

Following the plaintiff's presentation, the defendant has the opportunity to present evidence and plaintiff's counsel may cross-examine. After the defendant's case is presented, both sides may present rebuttal evidence.

After all the evidence has been presented, I will determine the applicable law after considering the views of counsel. This is called "settling instructions". We will then go back into session and the instructions will be read to you.

Following the reading of instructions, counsel may argue their cases. You are again reminded that the statements of the attorneys in closing arguments, as in opening statements, are not evidence but are intended only to assist you in evaluating the evidence and understanding the theory of the parties.

When the attorneys have completed their closing arguments you will go to the jury room to deliberate and reach a verdict. You will take with you the exhibits that have been received into evidence and a copy of the instructions that have been read to you.

When you have reached a verdict you will return to the courtroom and announce your decision.

Given:_____
District Judge

INSTRUCTION NO. 3

You are the sole judges of the facts in this case. It is up to you to determine which witnesses you will believe and what weight will be given to their testimony. In doing so, you may consider, for example, such things as their demeanor, apparent bias or prejudice, motive to testify truthfully or falsely, consistency, ability and opportunity to perceive, recall and communicate, or the over-all reasonableness of their testimony in the light of all the other evidence.

At the outset, a witness is entitled to a presumption that his or her testimony is truthful. This presumption may be overcome, however, by any evidence tending to disprove that testimony or raising a substantial question as to the witness' credibility. A witness false in one part of his or her testimony is to be distrusted in others. However, this rule does not apply to a witness who unintentionally commits an error. If weaker and less satisfactory evidence is offered and it appears that it is within the power of the party to offer stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

You should not be persuaded as to a particular fact simply because a greater number of witnesses testified to that fact if the contrary testimony of fewer witnesses is more convincing.

Where two witnesses testify directly opposite each other and are the only ones who testify on the same point, you are not bound MPI2d 1.02 (Pg. 1) General - Evidence to consider the evidence evenly balanced. You may regard all of the related evidence and give credence to one witness or the other. The evidence of any witness who you believe is sufficient proof of any fact.

You have a right to consider all of the evidence in the light of your own general knowledge, experience and common sense. Your determination of the facts must be based on the evidence presented, regardless of which side presents it. You are not to regard arguments, statements and remarks of attorneys as evidence and you should disregard them if they are not supported by evidence properly presented and received.

No act, remark, instruction, interrogation or ruling by me is to be construed by you as being any indication whatever of any opinion I might have as to what facts you should or might find.

GIVEN:_____
District Judge

PRECAUTIONARY INSTRUCTION

INSTRUCTION NO. 4

The only evidence you will consider in this case must come to you while you are together as a jury in the courtroom, in the presence of the judge, the attorneys and the parties. You must not consider any information about this case, which may come to you outside the courtroom. You must not discuss the case with anyone -- not even members of your family or your fellow jurors -- before you retire to consider your verdict. Even after the case is submitted to you for deliberation, you still must discuss it only in the jury room and in the presence of your fellow jurors.

During recesses, you must not discuss the case amongst yourselves or with anyone else, nor should you allow anyone to say anything to you or in your presence about this case. If anyone does try to say anything to you or in your presence about this case, you should advise him or her that you are on a jury hearing the case and ask them to stop. If they do not, you should advise the bailiff, who will advise me and I will take appropriate action.

Therefore, there are some persons with whom you should not talk even if the conversation has nothing to do with the case. You should not talk with the parties, their representatives, their attorneys or their witnesses. It is necessary to avoid even the appearance of unfairness or improper conduct.

You should not read newspaper headlines or articles relating to the trial. You must not watch or listen to television and radio comments or accounts of the trial while it is in progress.

You must not make any investigations on your own, view any material objects not presented in court or conduct any experiments of any kind. [I would particularly warn you against inspecting the accident scene involved in this lawsuit.]

Failure to observe these precautions might require the retrial of this case, which would result in long delay, considerable expense to the county and the parties and a waste of your time and effort.

Given: _____
District Judge

OBJECTIONS AND MOTIONS

INSTRUCTION NO. 5

From time to time counsel may make objections and motions and I will rule on them. Most of the time I will make these ruling in your presence. You should not conclude from any of my rulings that I have an opinion on the merits of the case, or that I favor one side or the other. If I sustain an objection to a question and do not permit the witness to answer, you should not guess what the answer might have been, nor draw any inference from the questions itself.

Sometimes the attorneys and I are required by law and considerations of fair trial to take up the matter of objections and motions outside your hearing. We may take care of these matters at the bench or in chambers, or I may excuse you so that arguments can be heard in the courtroom. Normally these involve purely procedural matters, which have nothing to do with your function as jurors. They are conducted in your absence for the sake of convenience and also to avoid unnecessary confusion. I will conduct these conferences so as to use as little of your time as possible.

Given: _____
District Judge

DEFINITION OF COMMON TERMS

INSTRUCTION NO. 6

To assist your understanding of these proceedings, I offer the following definitions of some commonly used legal terms: “Direct examination” is the questioning of a witness by counsel for the party presenting the witness. “Cross examination” is the questioning of a witness by counsel for an opposing party on the subject of the direct examination.

A “leading question” is a question, which suggests to the witness the answer that the examining party desires. Generally speaking, leading questions are not permitted on direct examination but are permitted on cross-examination.

“Hearsay” is the statement of a person, other than the witness offering it, which is offered as proof of the truth of the matter asserted in the statement. For example: “John told me (the witness) that Harry stole my horse.”

A Court may take “judicial notice” of some facts that don’t require proof (i.e., the world is round). I will advise you as to which facts, if any, you may take judicial notice.

There are generally speaking, two types of evidence. One is “direct evidence” -- such as the testimony of an eye-witness. The other is “circumstantial evidence”, which is proof of facts from which other facts might be inferred. The law makes no distinction between direct and circumstantial evidence. A case can be proved with either.

Given: _____

District Judge

EVIDENCE CHECKLIST

Useful for pretrial evidentiary rulings / Motions in Limine

1. Evidentiary Issues - Rule 101. Scope.

A. Rule 403 - Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

B. Hearsay Rule 801

Not Hearsay if not offered for the truth of the matter asserted.
803 Exceptions - Availability of declarant immaterial
804 Exceptions - Declarant unavailable
Confrontation Clause trumps hearsay exceptions

C. Expert Issues

Discovery & Impeachment - 26(b)(4) M.R.Civ.P.
Daubert, 509 U.S. 579 (1993) (foundation / reliability)
702 M.R.E. - Admit relevant scientific evid. - *Reavely*, 2007 MT 168

D. Exhibit Issues

Stipulation / Foundation

E. Character Issues

Rule 404(a)(1)/405(a) - Admissible when character "is an essential element of a charge, claim or defense"
Rule 608(a) & 608(b) - Evidence of character and conduct: Opinion and reputation
404(b) - Other crimes, wrongs or acts inadmissible except for other purposes: motive, opportunity, plan, knowledge, etc.

2. Evidence Ground Rules -- Written Rule: "When in doubt, let it in."

Making a record
Objection procedure - Court's direction to allow argument or no argument
Bench conference procedure - on the record
Procedure for explanation of evidence rulings - Court's discretion
Adopt a procedure for marking exhibits and publishing exhibits
Procedure for dealing with non-responsive answers

3. Make the attorneys do the initial research. Always ask for authority.

A. "What rule and caselaw supports keeping this evidence **out**?

B. Always ask for trial briefs or written motions in limine in complicated cases. (case cites will do in less complicated cases)

4. Applicable Montana Rules of Professional Conduct

Rule 3.4 Fairness to Opposing Party and Counsel

> A lawyer shall not:
> . . .
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocense of an accused;

Rule 3.3 Candor Toward the Tribunal

"Counsel, you know Rule 3.3, correct?"

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyers;

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

. . . . . .

HEARSAY OUTLINE CHECKLIST

Step One: Is the Statement an Out-of-Court Assertion? (801(a))

A. Identify the Declarant and the Out-of-Court Statement.
B. Determine if it's an oral or written assertion.
C. Nonverbal conduct intended as an assertion (substitute for words)

Step Two: Is the Statement Being Used to Prove the Truth of the Assertion? (If it's being offered for some other reason, what's the relevancy?) 801(c)

A. Other (just important that it was said.) - Nonhearsay - ["NH"]
B. Impeachment - NH
C. Verbal Acts - NH
D. Effect on Listener/Reader & Notice and Disclosure - NH
E. State of Mind - but use 803(3) - NH

Step Three: Is the Declarant the Opposing Party, a Witness at Trial, or Unavailable?

A. When the Declarant is the Opposing Party (Anything they say comes in) - Admissions 801(d)(2)(A), B, C & D
B. When the Declarant is a Witness at Trial/subject to cross-examination - 801(d)(1)(A)(B)(c)
C. When the Declarant is Unavailable (804(a)) and statement is trustworthy/reliable.

Step Four: Is There Something Special About the Statement that Makes it Reliable?

A. Trustworthy/How was the statement said?
803(1) and 803(2).
B. What was the statement about?
803(3)(4)(5)
C. Where is the statement kept?
803(6)(8)(18)

Step Five: Additional Considerations.

A. 805 (hearsay within hearsay)
B. 804(5) Residual (Catchall) Exception (rare)

SEVEN TYPES OF IMPEACHMENT POSSIBLE

		RULE	EXTRINSIC EVIDENCE
1.	**Bias, interest, motive** - family ties (ex: brother of def.) - financial ties (ex: expert paid for testimony - employment (ex: ins. agent who works for def) - plea agreement in criminal case (ex: less prison time if you testify against the defendant) - membership in same organization - sexual relationship	No direct rule (401-403, 611 (a))	Yes, if witness denies
2.	**Sensory & Mental Capacity** - perception problems - can't see - can't hear - can't remember Examples: Obstructions Too dark No glasses No hearing aid Suffering memory loss Using alcohol/drugs	No direct rule (401-403, 611(a))	Yes, if witness denies
3.	**Opinion/Reputation** (Untruthfulness/Dishonesty)	608(a)	Yes, if attacked (opinion and reputation for truthfulness)
4.	**Past Bad Acts (non-conviction)** (Untruthfulness/Dishonesty)	608(b)	No. Specific conduct evidence inadmissible (otherwise Court's discretion to prove truthfulness.)
5.	**Convictions** (Untruthfulness/Dishonesty)	609	No, inadmissible in MT state courts

6.	**Prior Inconsistent Statements of A Witness** ex: W1 said light was red 2 yrs ago W1 says light is green at trial	613(b)	Yes (if witness denies statement)
7.	**Contradiction** (2 witnesses; 2 different versions) ex: W1 testifies light is green ex: W2 testifies light is red	No direct rule (401-403, 611(a))	Yes (unless collateral or insignificant)

RULE 608 - FIVE WAYS TO ATTACK

Two ways to attack on direct:

1. Using 608(a) with opinion evidence about witness' bad character (e.g. dishonesty, untruthfulness)
2. Using 608(a) with reputation evidence about witness' bad character (e.g. dishonesty, untruthfulness)

Three ways to attack on cross:

1. Using 608(b)(1) by asking witness about specific instances of his/her dishonesty (good faith basis, 403, no extrinsic evidence)
2. Using 609 by asking if witness has prior felony conviction **NOT in MT state courts.**
3. Unusually sharp cross-examination suggesting a witness is lying or corrupt

more MRE 608

608 Dishonesty Examples:

* Using a false name
* Attorney discipline/unethical conduct
* Committing forgery
* Laying on your mortgage application
* Embezzling funds from an employer
* Falsifying corporate books
* Filing a false tax return
* Filing a false insurance claim
* Passing bad checks
* Lying on your bar application

Four Safeguards:

1. Must be a good faith basis. 3.4(e), MT. R. Prof. Conduct
2. "in the discretion of the court." -- MRE 403
3. Can only deal with untruthful (dishonest) conduct. (Cannot be about drugs, violence or sex.)
4. No extrinsic evidence allowed. (Questioner bound by witness' answer.)

JUROR BIAS or PREJUDICE -- VOIR DIRE

1. Juror voir dire has constitutional implications. *Shane v. Butte Electric Railway Company*, 37 Mont. 599, 601, 97 P. 948, 959 (1908).

2. Right to a fair and impartial jury - Reasonable inquiry is allowed to expose juror bias or prejudice in order to exercise peremptory challenges. *Haynes v. Missoula County*, 163 Mont. 270, 287-8, 517 P.2d 370, 380 (1973).

3. Right to a fair and impartial trial - Permissible to lay foundation to question jurors regarding their view on lawsuits and trial lawyers. *Borkowski v. Yost*, 182 Mont. 28, 33, 594 P.2d 688, 690 (1979).

4. Manifest error to refuse to dismiss for cause juror who expressed bias in favor of one of the parties. *Mahan v. Farmers Union Central Exchange, Inc.*, 235 Mont. 410, 417, 768 P.2d 850, 855 (1989).

5. Structural error requires automatic reversal - Court abused discretion in denying challenge for cause of biased juror later removed by peremptory challenge. *State v. Good*, 309 Mont. 113, 125-7, 43 P.3d 948, 959 (2002).

6. Three-prong procedure for evaluating *Batson* violation: prima facie case of purposeful discrimination, burden shifts for non-discriminatory explanation for exercise of peremptory challenges, court issues determination through findings of fact. *State v. Parrish*, 327 Mont. 88, 111 P.3d 671, 2005 MT 112.

7. When counsel develops information in the record that demonstrates a serious question regarding jurors' ability to be fair and impartial, under the totality of circumstances, dismissed for cause is favored. *State v. Golie*, 2006 MT 91, ¶29, 332 Mont. 69, ¶29, 134 P.2d 95, ¶29:

> "We take this opportunity to remind trial courts that our decisions favoring dismissals for cause - when a nonspeculative "serious question" arises about a prospective juror's ability to be fair and impartial - are premised upon both the constitutional right to a trial by an impartial jury and the significant expense and inconvenience that results from retrial."

The Judge of the ____ Judicial District would appreciate your filing out this questionnaire. Your answers to the following questions will help to improve jury service. All responses are voluntary and confidential. It is difficult for us to understand exactly what problems juries encounter unless we receive a candid response. Thank you very much.

~~~ DO NOT SIGN this questionnaire. ~~~

JURY SERVICE QUESTIONNAIRE

Criminal Trial -- Cause No. _____ _____v. _____

1. Approximately how many hours did you spend at the courthouse? _____

2. Please rate the following factors for your jury service.

		Good	Adequate	Poor
(a)	Treatment by courthouse personnel:			
	Court Clerk	( )	( )	( )
	Bailiffs	( )	( )	( )
	Judge	( )	( )	( )
	Other: _____	( )	( )	( )
(b)	Efficient use of your time:	( )	( )	( )

(c) Any comments on these factors: _____
_____
_____

3. During your service on the jury:

		Yes	No
(a)	Did the Judge conduct the trial in a fair and impartial manner?	( )	( )
(b)	Were the attorneys prepared to present their cases effectively?		
	Plaintiff's attorney	( )	( )
	Defense attorney	( )	( )
(c)	Were the jury instructions		
	Understandable	( )	( )
	Confusing	( )	( )
	Absolutely of no value	( )	( )

(d) Any comments on these factors? _____
_____

4. What could be changed to improve jury service for you? _____
_____
_____

ATTORNEY FEE AWARD

A Court may award attorney fees where a statute or contract provides for their recovery. *Stavenjord v. Montana State Fund*, 2006 MT 257, ¶21, 334 Mont. 117, ¶21, 146 P.3d 724, ¶21. The Court ordinarily must set a hearing to consider the factors in awarding reasonable attorney fees, *Plath v. Schonrock*, 2003 MT 21, ¶35, 314 Mont. 101 ¶35; 64 P.3rd 984 ¶35; *Stimac v. State*, 248 Mont. 412, 417; 812 P.2d 1246, 1249 (1991). In determining what constitutes reasonable attorney fees, the following factors, among others, will be considered as guidelines:

1) the novelty and difficulty of the legal and factual issues involved;
2) the labor and time required to perform the legal services properly;
3) the character and importance of the litigation in which the services were rendered;
4) the fees customarily charged for similar legal services at the time and places whre the services were rendered;
5) the professional skill, experience, and reputation of the attorney;
6) the attorneys' character and standing in their profession;
7) the results secured by the services of the attorneys, including the risk of no recovery;
8) the reasonable attorney hours billed,
9) the ability of the client to pay for the legal services rendered.

Supplemental necessary and proper relief in a declaratory judgment action may include an award of attorneys fees. *Trustees of Univ. of Indiana v. Buxbaum*, 2003 MT 97, ¶19, ¶46, 315 Mont. 210, ¶19, ¶46, 69 P.3d 663, ¶19, ¶46.

> "[A]n attorney may be entitled to the entire fee where it is impossible to segregate the attorney's time between claim entitling the party to attorney fees and other claims." *Donnes v. Orlando*, 221 Mont. 356, 361-62, 720 P.2d 233, 237 91986).

The attorney's time expended to establish the reasonableness of attorneys fees ("fees for fees") may be included in the recovery. *Blue Ridge Homes Inc. v. Theim*, 2008 MT 264, ¶80 345 Mont. 125, ¶80, _____ P.3d _____, ¶80.

RULE 11, M.R.Civ.P. - SANCTIONS

1. Every pleading, motion, or other paper shall be signed by either the attorney of record, or the self-represented party.

2. The signature constitutes a certificate by the signer that:

    a. the signer has read the document, and

    b. to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal or existing law, and

    c. it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

    d. Note: "good faith argument": The Montana Supreme Court has held that to satisfy Rule 11, "a party need not be correct in his view of the law, but the party must have a good faith argument for his or her view of what the law is or should be." *Jacildo v. McFadden* (1992), 253 Mont. 114, 116, 831 P.2d 597, 598.

3. If a pleading or motion is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

4. An appropriate sanction "shall" be imposed for a violation of Rule 11:

    a. either upon motion or *sua sponte*,

    b. upon the person who signed the document, a represented party, or both,

    c. an appropriate sanction may include an order to pay the reasonable expenses, including a reasonable attorney fee, incurred by the other party because of the filing.

    d. The decision to order sanctions "rests within the sound discretion of the district court." *Bee Broadcasting Assoc. v. Reier* (1989), 236 Mont. 275, 278, 769 P.2d 709, 711 (citation omitted).

    e. Note: due process requirement: Before imposing Rule 11 sanctions, a court must give notice to party it proposes to sanction and hold a hearing on whether sanctions should be imposed. *Stipe v. First Interstate Bank of Polson*, 2005 MT 295, ¶ 20, 329 Mont. 320, ¶ 20, 125 P.3d 591, ¶ 20.

RULE 37, M.R.Civ.P. - FAILURE TO MAKE DISCOVERY: SANCTIONS

Motion for Order Compelling Discovery - Rule 37(a)

1. A party may apply for an order compelling discovery after providing reasonable notice to other parties and all persons affected.

2. If taking an oral deposition, the proponent of the question may complete or adjourn the deposition before applying for an order compelling discovery.

3. An evasive or incomplete answer is treated as a failure to answer.

4. If the motion compelling discovery is denied in whole or in part, the Court may enter a protective order as if a motion had been made under Rule 26 (c).

5. Award of Expenses:

    a. If the motion is granted, and after opportunity for hearing, the responsible party may be ordered to pay the moving party's reasonable expenses incurred in obtaining the order, including attorney's fees, "unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

    b. If the motion is denied, and after opportunity for hearing, the moving party may be ordered to pay the other party's reasonable expenses, including attorney's fees.

Caselaw re: Sanctions for Discovery Abuse

1. "The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith." *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, ¶ 22, 130 P.3d 634, ¶ 22.
(*i.e.* "mutual knowledge of all relevant facts;" and "a fair contest with the basic issues and facts disclosed to the fullest practical extent.")

2. The Montana Supreme Court "strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently." *Richardson*, ¶ 56.

3. Trial courts "must remain intent upon punishing transgressors rather than patiently encouraging their cooperation." *Richardson*, ¶ 56.

4. "[T]he imposition of sanctions for failure to comply with discovery procedures is regarded with favor." *Richardson*, ¶ 56. "It is, after all a maxim of our rules of discovery that the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires." *Id*.

5. "[B]latant and systemic" discovery abuses that undermine the integrity of the entire proceeding may warrant entry of a default judgment on liability." *Richardson*, ¶ 65.

Three-part test for Rule 37(b) Sanctions

1. Notice/hearing requirement: "When a person is sanctioned with attorney's fees and costs pursuant to Rule 37(b), that person is entitled to notice and the opportunity to be heard before the imposition of sanctions." *Dambrowki v. Champion International Corp.*, 2000 MT 149, ¶ 24, 300 Mont. 76, ¶ 24, 3 P.3d 617, ¶ 24.

2. Montana Supreme Court will generally defer to trial court regarding discovery sanctions "because it is in the best position to determine both whether the party in question has disregarded the opponent's rights, and which sanctions are most appropriate." *Rothing v. Kallestad*, 2007 MT 109, ¶ 49, 337 Mont. 193, ¶ 49, 159 P.3d 222, ¶ 49.

3. Discovery sanctions reviewed for abuse of discretion under three-part *Smith* test.

   Whether the consequence inflicted via the sanction:

   a. relates to the extent and nature of the actual discovery abuse;

   b. relates to the extent of prejudice to the opposing party which resulted from the discovery abuse; and

   c. is consistent with the consequences expressly warned of by the court. Note: "[T]he third prong of the *Smith* test requires only that the sanctions imposed be consistent with those of which the trial court expressly warns a party. Thus, this factor only applies if the trial court issues an express warning." *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co. Inc.*, 2005 MT 254, ¶ 15, 329 Mont. 38, ¶ 15, 122 P.3d 431, ¶ 15.

   Additional consideration is a party's disregard of the court's orders and authority. *Culbertson*, ¶ 14.

DECISION DRAFTING

Presented by:

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Assistant Professor
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Montana Judges Association
Spring 1998
Judicial Education Conference
Bay Point on the Lake
Whitefish, Montana

May 19, 1998

Steps to Judicial Writing

Writing does not begin by setting pen to paper. Certain preliminary steps must be taken to prepare for writing. The writing in its final form should offer an orderly dialogue with a progression of ideas, starting from the beginning, proceeding through the reasoning process and concluding in a disposition.

Prewriting:

Step 1 - Review the file.
Step 2 - Do any preliminary research necessary to an understanding of the claims, issues or case.
Step 3 - Prepare a hearing outline. Decide the following:
1) What are the elements of proof necessary?
2) What is the burden of proof standard?
3) What standard is used to decide the relief?
4) What questions are unanswered?

Step 4 - Hearing.
1) Listen with an open mind.
2) Take notes.
3) Ask any questions necessary to the outline.
4) Make a preliminary decision.

Writing:

Step 1 - List the material facts.
Step 2 - Do any legal research needed to apply the law to the specific facts of the case.
Step 3 - Identify the issue(s) to be decided.
Step 4 - Draft an outline of the decision/opinion.
1) Justification for one conclusion may disappear while justification for another may be discovered. This is healthy.
2) Examine alternatives in reasoning and test that reasoning.
Step 5 - Eliminate unnecessary words, phases, ideas or detail. Reorganize the material, if necessary. Any change that will aid reader understanding should be made.
Step 6 - Edit. Check spelling, grammar, and form. Rewrite; rewrite; rewrite.

Postwriting:

After the decision/opinion has been filed and for future guidance, the writer should review his own work by using the following procedure:

Step 1 - Wait thirty days and reread the writing.
Step 2 - Answer several questions:
1) Was the writing clear and understandable?
2) Was the writing persuasive?
3) Today, would you write it any differently? If so, how?
4) Is the writing succinct and concise?

Rules for Decision Writing[1]

These rules, like most writing rules, are guidelines that should be followed on most occasions but can be violated for a good reason.

1. Keep the decision short and concise. It should be easy to read, interesting, and should flow from one subject to another.

2. Organize the decision effectively. All but the shortest decisions should have the following five sections:
    a. the nature of the case (procedural summary)
    b. the facts
    c. the issues
    d. the law and reasoning (analysis)
    e. the conclusion (disposition)

3. Use short, simple sentences with strong verbs.

4. Use short paragraphs, with maximum length of half of a double-spaced page.

5. Write for all members of your intended audience, which includes the parties, their lawyers, the bar in general, the appellate court, and, in cases of public interest, the community and beyond.

6. Use common words and short synonyms for long words.

7. Never use sarcasm (irony is okay) and generally avoid humor.

8. Write as soon as possible after hearing the arguments and reading the briefs. You will never be as familiar with the issues, facts and law.

9. Avoid legalese, such as "the said party," "hereinafter referred to," and "the aforementioned."

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[1] This list was adapted in large part from Joyce J. George, *Judicial Opinion Writing Handbook* (3rd ed. 1993), which was also the source of the Steps to Judicial Writing and other concepts in this presentation. Additional concepts were drawn from the American Bar Association's *Judicial Opinion Writing Manual* (1991), as well as from my experience as a journalist, lawyer and teacher of both composition and legal writing.

10. Do not use a lot of citations when one will do.

11. Do not try to analyze every contingency you may foresee, no matter how farfetched. Doing so leads to confusion.

12. Avoid quoting testimony in question and answer form. Use a summary if it is necessary to support the decision.

13. Do not recite the pleadings.

14. Use the same term for the same party throughout the opinion, and preferably use proper names or descriptive titles ("the landlord," "the contractor") rather than the formal party designation of "plaintiff" and "defendant."

15. Avoid using italics, underlining, and quotation marks for emphasis. Remember that to emphasize too much is to emphasize nothing.

16. Eliminate all unnecessary detail. Irrelevant facts and law, tangential footnotes, and supplementary details should be left out.

17. Discuss every argument raised by the parties, and explain why key cases cited by the losing party are distinguishable. Few things frustrate attorneys more (or likely lead to more motions for reconsideration) than having arguments or authority they thought persuasive ignored completely by a judge.

Annotations to *Jones v. Clinton*
990 F.Supp. 657 (E.D. Ark. 1998)

1. **What are we reading?** The decision begins by potentially misidentifying itself in two ways, both of which are common. The Judicial Opinion Writing Handbook states that "the trial judge writes a decision while the appellate judge writes an opinion." This distinction focuses on the fact that trial judges decide cases while appellate judges opine as to whether the decision was correct. Because Judge Wright is a U.S. district judge, this should be labeled a decision. However, Black's Law Dictionary suggests that no such clear distinction exists, and that the words are used interchangeably.

   Additionally, the Handbook states that the adjective "memorandum," when attached to an opinion or a decision, means that the document "is distinguishable only by its brevity" and requires little analysis, usually because there is binding precedent directly on point. This decision, as published in the Federal Supplement, contains 34 headnotes, has 21 footnotes, and runs to more than 20 single-spaced pages. I doubt any judge who got such a document from an attorney would consider it brief.

2. **The sum of the parts.** This paragraph is the "nature of the case" section, the first of the five parts every substantial district court decision should contain. The other four are "facts," "issues," "law and reasoning," and "holding." Each will be discussed in turn.

   The nature of the case section should do the following:
   a. state the general nature of the case;
   b. give the relevant procedural history;
   c. tell the reader what the court is being asked to decide;
   d. announce the court's decision.

   Here, Judge Wright gives all of the necessary information, although she could be more specific when describing the actual conduct at issue in the lawsuit ("alleged actions beginning with an incident in a hotel suite"). The procedural history is also unusually long, but then this case was unusual in many ways, and had already been to the United States Supreme Court.

   However, Judge Wright does her readers a favor by announcing her decision right away at the end of this section. Some judges seem to think that keeping the reader in the dark makes the decision more suspenseful, but every attorney I know quickly turns to the end of the decision to see who won if it isn't clear in

the first paragraph or two.

3. **Call them what they are.** This Roman numeral at the start of the "fact" section seems unnecessary to me and not as helpful as a section heading, such as "Facts of the Case." You should consider giving each major section of the decision a heading (except perhaps the "nature of the case" section, which traditionally is not labeled, probably because it comes first and its purpose is obvious).

   However, the sources disagree on the value of headings. The ABA's *Judicial Opinion Writing Manual* suggests that headings are useful to the reader and includes them in its model opinion. But the *Judicial Opinion Writing Handbook,* feels strongly that headings should only be used in the most complicated of cases; otherwise "[t]hey add nothing, consume valuable space, *and require extra reading time.*" (Emphasis added.)

   The *Handbook's* criticisms of section headings seem weak. A heading consumes a line, so section headings would add only a few lines (facts, discussion, holding), which seems minimal enough. And all of those headings don't add five words and take considerably less time to read than this sentence. Additionally, using headings instead of Roman numerals for each major section leaves the numerals available for the outline of the "discussion" section. That can be especially useful in a complex decision because it saves you from having to go to another sublevel of the outline, (*e.g.,* "iii"), as discussed in more detail below. In any event, the length and complexity of this opinion suggest that even the *Handbook* might have authorized Judge Wright to use headings.

4. **Once upon a time.** A good fact section tells a coherent and concise story. It should:
   a. begin with a paragraph describing the parties and summarizing their legal relationship;
   b. set forth only those facts that are material to the issues before the court and to the reader's understanding;
   c. state the facts in past tense, and in an objective tone;
   d. list the facts chronologically, unless logic dictates some other order;
   e. include citations to the record, at least for any material facts in dispute;
   f. be simply and clearly written -- classic example is Justice Cardozo's description from *Palsgraf v. Long Island Railroad.* Note the simple sentences with strong verbs (underlined) in the

following passage:

"Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues."

In *Jones v. Clinton*, Judge Wright doesn't quite display the story telling abilities of a Cardozo, but she does an exhaustive job of laying out the facts as alleged by Paula Jones, and citing to the record for each. Because she granted summary judgment to the President, she needed to state the facts in as much detail as possible so she could not be accused on appeal of ignoring a crucial allegation by Ms. Jones. But the story certainly is more interesting than a commuter mishap at a train station.

5. **Give most footnotes the boot.** While the *Handbook* and *Manual* may disagree on whether to use section headings, they are unanimous in their disdain for footnotes in decisions and opinions. Their logical reasoning is that if something is important to the decision, it should be included in the text; if it isn't important, then it shouldn't be included at all. Footnotes also require readers to repeatedly interrupt their train of thought and are difficult to read. The Montana Supreme Court also appears to frown on footnotes, which are extremely rare in its opinions.

As noted earlier, the decision in *Jones v. Clinton* contains 21 footnotes, most of which I edited out to reduce the opinion's length. Judge Wright used footnotes for a variety of purposes, including to provide additional procedural history, to give the text of statutes, and to quote from depositions. Most of them could have been left out or incorporated into the discussion or deleted.

However, I have left in several footnotes that actually do seem to fulfill a legitimate purpose. Footnotes 5-7, for example, point out how Ms. Jones' has changed her version of events to make the President's alleged conduct more egregious. Because the court was required to view the facts in the light most favorable to her, arguably the changes are not legally relevant to the court's decision. But by pointing them out in footnotes, Judge Wright subtly gets the point across that Ms. Jones' credibility is perhaps suspect even while taking the facts as she now alleges them. Footnote 16, on page 12, is for a similar purpose, noting that Ms. Jones had quietly attempted to drop one unfounded allegation and never even reviewed her employment records.

Would it have been more effective for Judge Wright to have incorporated the content of these footnotes into the text? Perhaps. But they are a much closer call than the other three footnotes I left in the decision. Footnote 10, on page 7, is used to distinguish a case cited by Ms. Jones' attorneys, which clearly should be part of the text. Footnote 12, on page 10, notes that Ms. Jones' current legal theory is significantly at odds with what she had previously argued. That, too, should be in the discussion, as a last-minute change in legal theory goes directly to the merits. The same is true of footnote 21, on page 18, which succinctly notes that the evidence developed during discovery does not support the Plaintiff's allegations. That is not exactly a tangential aside.

6. **Now, where was I?** After a long statement of facts, such as the one here, a concluding paragraph in the fact section setting forth the nature of the claims is worth considering. Notice how it dovetails well with the statement of the issues found in the first paragraph of the "discussion" section.

7. **Chapter II?** Again, instead of identifying the discussion section with a Roman numeral, you should consider simply using the heading "Discussion" or "Analysis" and saving the outline numbers for the analysis within this section.

8. **How to get there from here.** This first paragraph of the discussion section is the usual place to look for the third major part of a decision -- the issues. Here you should give the reader a road map of how the analysis that follows is organized by identifying the issues in the order in which they are to be discussed. Judge Wright does an excellent job of that by using parenthetical numbers and letters to establish the relationship between the issues and their subissues -- in other words, she gives the reader an outline. After reading this paragraph, the reader quickly knows that the President has two reasons why each of Ms. Jones' three counts should fail.

9. **Building a better outline.** While there may be some debate about whether section headings are useful to identify the different main sections of a decision, few would dispute that pointheadings and subheadings from the court's outline within the discussion section are helpful to the reader in following the analysis of each issue.

Here, Judge Wright does provide the numbers and letters of her outline, but fails to give any description of what each section of the outline discusses. That confuses readers, especially as they get deeper and deeper into the subsections, which go all the way to II,B,1,a,ii,1-4. Without companion headings, the numerals themselves are of little value. Does the Arabic numeral 3 on page 13 indicate the start of subsection 3 of section B? Or is it the start of subsection 3 of subsection ii of subsection a of subsection 1 of section B?

The confusion is exacerbated by the fact that the first section of the discussion, designated A, only states the well-known law of summary judgment and has no analysis whatsoever. Section B, beginning on page 7, contains the court's entire analysis of Ms. Jones' three claims. In effect, Judge Wright's outline gives the same weight to summary judgment law as to resolution of the issue of whether the President of the United States can be forced to trial on sexual harassment charges.

It would be more useful to the reader to outline only the discussion section, and to use headings and subheadings as well as numbers and letters. One way to rework the decision's existing outline and add headings is set forth on the following page (with the existing outline designation is in parentheses). If these headings were incorporated, each time the reader came to one he or she would immediately know what that section concerned and its relationship to the preceding sections.

If headings are used, they should be complete sentences (punctuated and capitalized as sentences) until the lower levels of the outline, where phrases are okay. They should also be in the form of "thesis" sentences stating your conclusion on that section. If you announce your conclusion on a particular issue or subissue at the start, the reader then reads the analysis that follows with that conclusion in mind. That in turn makes the analysis more subtly persuasive because the reader knows where it is heading and can bridge over any minor gaps along the way. (See Annotation 12 for more on the use of "thesis" sentences.)

I.(II,B,1) Plaintiff's § 1983 equal protection claim fails under each theory.

A.(?) Plaintiff's assertions of sexual assault are without merit.

B.(B,1,a) Plaintiff cannot establish quid pro quo sexual harassment.

1.(?) Contrary to Plaintiff's argument, Title VII law governs § 1983 sexual harassment claims.

2.(B,1,a,i) Contrary to Plaintiff's argument, she must show a tangible job detriment.

3.(B,1,a,ii) Plaintiff failed to show she suffered any tangible job detriment.

a.(B,1,a,ii,1) Lack of advancement.

b.(B,1,a,ii,2) Changed job duties.

c.(B,1,a,ii,3) Denial of access to grievance procedures.

d.(B,1,a,ii,4) Isolation and lack of flowers.

4.(B,1,a,iii) Conclusion: Plaintiff's quid pro quo claim fails.

C.(B,1,b) Plaintiff cannot establish she experienced sexual harassment due to a hostile work environment.

II.(B,2) Plaintiff's § 1985(3) conspiracy claim fails because it depends on her § 1983 claim.

III.(B,3) Plaintiff's emotional distress or outrage claim under state law fails.

IV.(III) The President's alleged suppression of evidence regarding other "victims" is irrelevant, as Plaintiff herself was not harassed.

10. **Enough's enough.** This is what is known as a "string citation" -- a list of citations all supporting one legal point with no mention of the facts of each case. The *Judicial Opinion Writing Handbook* states: "When an author's stand on an issue is supported by numerous citations, it raises a red flag to the reader indicating the author's doubt as to the correctness of that decision. The author's position is weakened rather than strengthened by numerous citations."

    If the principle of law is clear, one cite is enough. If the principle isn't clear, and you feel the need to document that you have chosen the correct rule, then merely listing a bunch of cases without any factual analysis of how those cases support the rule doesn't do the job. Instead, consider including parenthetical factual descriptions after each cite to give the reader the information necessary to see how the rule was applied in each case cited. Compare the lack of parenthetical information here with what Judge Wright did on page 10. You can see how much more persuasive it is to include the key facts after each citation.

    A note about style: Judge Wright (or her clerk) is mostly in conformity with The Bluebook (16th ed.), Rule 1.5, which requires that parenthetical information in citations begin with the present participle and a lowercase letter, *i.e.*, "(holding that . . .)." Be sure to close the parentheses.

11. **Citation gullies.** This sentence is a particularly bad example of another common citation problem -- placing a long citation clause in the middle of a sentence. By citing the three cases Ms. Jones relies on in the middle of this sentence, Judge Wright forces the reader to leap across the citation to get to the rest of the sentence. Once there, the reader then has to look back across the citation to figure out what was already said. Nothing would be lost by simply waiting to introduce the cases in a citation sentence after this textual sentence.

12. **Start out strong.** The first sentence of this paragraph is a good example of a "thesis" sentence, as opposed to a more general topic sentence. Everyone knows that paragraphs should generally begin with a topic sentence telling the reader what the paragraph is about. A thesis sentence is simply a more specific, and more persuasive, type of topic sentence that not only tells what the paragraph is about, but also gives the author's position on the topic.

    For instance, an acceptable topic sentence for this paragraph would be: "Plaintiff claims that she suffered a tangible job detriment because she was discouraged from applying for more attractive jobs and seeking reclassification at a higher pay grade within the AIDC." Because the rest of the paragraph does

explore the evidence Ms. Jones presents on that topic, that sentence is accurate. And because the next paragraph then explains why Ms. Jones' evidence is insufficient, the reader soon learns the judge's conclusion on this subissue.

However, because Judge Wright begins the first paragraph with a thesis sentence, the reader is immediately told how he or she should also view that evidence. When readers enter the body of a paragraph knowing the conclusion they are expected to reach from that paragraph, it is much easier for them to focus on how the content of the paragraph supports (or doesn't) the writer's view. Additionally, thesis sentences also help the writer because they force him or her to support the thesis with sound analysis. It will quickly become apparent, to the writer as well as the reader, if that support is lacking.

The next annotation discusses where the use of thesis sentences is particularly effective.

13. **IRAC isn't just for first years.** I've chosen this last section analyzing Ms. Jones' emotional distress claim to show how the most common, and probably most effective, legal writing format works -- and how it can be fine-tuned to work even better. IRAC, as most of you probably know, stands for Issue, Rule, Application and Conclusion. It is the structure most law schools teach students for legal analysis, and also is found in most well written opinions and decisions.

The IRAC structure requires that the writer begin with a statement of the issue being discussed in that particular section or subsection. Note that IRAC should be followed for each subsection of the analysis, no matter how deep into the outline. Judge Wright's first sentence is a topic sentence (as opposed to a thesis sentence) that identifies the issue in a very straightforward fashion.

If this were a brief, I would suggest that the writer identify the issue by using a thesis sentence stating the writer's position on it. Something like: "Plaintiff's state law claim of intentional infliction of emotional distress based on sexual harassment has no more merit than her federal civil rights claims." But that technique can seem overly partisan in a judicial decision, especially if it comes right after a thesis sentence pointheading stating as much, as suggested.

In keeping with the IRAC structure, the rest of the first paragraph of this section states the general rule setting forth the elements of an emotional distress claim. However, Judge Wright begins to deviate from IRAC in the second paragraph. One of the precepts of IRAC is that the governing rules will be set forth and explained in full before the writer begins to apply those rules to the facts of the

present case. The second paragraph of this section switches to the President's arguments on why the claim must fail, and even adds that the court agrees with those arguments. Yet the third paragraph jumps back and gives important subrules about how the elements of the claim are to be applied. And the fourth paragraph then gives Ms. Jones' arguments.

This section would be better organized and in keeping with IRAC if the third paragraph immediately followed the first, so that all the important rules were explained at the same time. The reason explaining all the rules before applying any is generally more effective is that sophisticated legal readers begin applying the rules themselves as they read them. So when they get to the application, they often begin mentally nodding their heads in agreement (assuming both writer and reader have reached the logical conclusion).

Then, when the discussion shifts to the next part of IRAC, the application of the rules to the facts, the court should begin the application with a thesis sentence announcing its conclusion. Revised per IRAC, the first four paragraphs of this section, along with its heading, might look like this:

> **III. Plaintiff's emotional distress claim under state law also fails.**
>
> Finally, the Court addresses plaintiff's state law claim of intentional infliction of emotional distress or outrage. Arkansas recognizes a claim of intentional infliction of emotional distress based on . . . .
>
> One is subject to liability for the tort of outrage or intentional infliction of emotional distress if he or she wilfully or wantonly causes severe emotional distress to another by extreme and outrageous conduct. . . . In *M.B.M. Co. v. Counce*, . . . the Arkansas Supreme Court stated that . . . .
>
> In light of the strict approach taken by the Arkansas Supreme Court, this Court agrees with the President that the plaintiff has failed to identify the kind of clear-cut proof required for a claim of outrage. Therefore, the President is entitled to summary judgment because, as he argues, the alleged conduct of which plaintiff complains was brief and isolated; did not result in any physical harm . . . .
>
> Plaintiff seems to base her claim of outrage on her erroneous belief that the allegations she has presented are sufficient to constitute criminal sexual assault. She states . . . .

After that, the remainder of Judge Wright's discussion could remain as is and still be true to the IRAC format. However, that does not mean that the individual paragraphs of the application could not be improved, especially through the use of strong thesis sentences at the start of each paragraph of the application. Test your understanding of the thesis sentence concept by identifying which of paragraphs 5-9 begin with thesis sentences and which begin with topic sentences. Paragraph 10, of course, is the conclusion for this subsection.

14. **The independent counsel begs to differ.** Judge Wright manages to neatly avoid the issue of whether the President suppressed evidence of a pattern of sexual harassment; she logically concludes any such evidence is irrelevant if Ms. Jones was not herself a victim. But how Judge Wright treats this issue organizationally is not as sound. In her outline, the issue is given a Roman numeral, making it one of the four major sections of the decision, along with the facts, discussion, and conclusion. That seems odd, as the issue of whether pattern evidence is relevant should be part of the legal analysis. Check back to annotation 9 to see how it was treated in the revised outline.

15. **The end.** The last of the five required sections of a decision is the holding or conclusion. It is generally a single paragraph or sentence reciting the judge's intent as to the disposition of the case, which will then be the basis for the judgment. Again, you should consider labeling it with a section heading.

Rules for Decision Writing[1]

These rules, like most writing rules, are guidelines that should be followed on most occasions but can be violated for a good reason.

1. Keep the decision short and concise. It should be easy to read, interesting, and should flow from one subject to another.

2. Organize the decision effectively. All but the shortest decisions should have the following five sections:
    a. the nature of the case (procedural summary)
    b. the facts
    c. the issues
    d. the law and reasoning (analysis)
    e. the conclusion (disposition)

3. Use short, simple sentences. Cut out "or" and "and" where possible.

4. Use short paragraphs, with maximum length of half of a double-spaced page.

5. Write for all members of your intended audience, which includes the parties, their lawyers, the bar in general, the appellate court, and, in cases of public interest, the community and beyond.

6. Use common words and short synonyms for long words.

7. Never use sarcasm (irony is okay) and generally avoid humor.

8. Write as soon as possible after hearing the arguments and reading the briefs. You will never be as familiar with the issues, facts and law.

9. Avoid legalese, such as "the said party," "hereinafter referred to," and "the aforementioned."

10. Do not use a lot of citations when one will do.

11. Do not try to analyze every contingency you may foresee, no matter how farfetched. Doing so leads to confusion.

12. Avoid quoting testimony in question and answer form. Use a summary if it is necessary to support the decision.

13. Do not recite the pleadings.

---

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14. Use the same term for the same party throughout the opinion, and preferably use proper names or descriptive titles ("the landlord," "the contractor") rather than the formal party designation of "plaintiff" and "defendant."

15. Avoid using italics, underlining, and quotation marks for emphasis. Remember that to emphasize too much is to emphasize nothing.

16. Eliminate all unnecessary detail. Irrelevant facts and law, tangential footnotes, and supplementary details should be left out.

17. Discuss every argument raised by the parties, and explain why key cases cited by the losing party are distinguishable. Few things frustrate attorneys more (or likely lead to more motions for reconsideration) than having arguments or authority they thought persuasive ignored completely by a judge.

MONTANA DISTRICT COURT JUDGES' DESKBOOK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. **The legal basis for findings and conclusions.**

Rule 52(a) Montana Rules of Civil Procedure

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. ***

II. **When findings and conclusions are required.**

A. Findings and conclusions are required "[i]n all actions upon the facts without a jury or with an advisory jury." Rule 52(a) Mont. R. Civ. P. Essentially, when the court hears contested matters in a bench trial, it should issue findings and conclusions.

B. Findings and conclusions are required in equity cases tried to a jury. Stoddard v. Gookin, 191 Mont. 495, 508, 625 P.2d 529, 536 (1981). Stoddard, an equity case involving a real estate transaction and escrow, was tried to a jury which answered an interrogatory verdict upon which the judge entered judgment. The judge refused to issue findings and conclusions, and the Supreme Court reversed and remanded for factual determination by the judge, reasoning that the jury was advisory, since their interrogatory answers did not dispose of the case.

C. Findings and conclusions are required on granting of an injunction.

1. [I]n granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." Rule 52(a) Mont. R. Civ. P.

2. In Ensley v. Murphy, 202 Mont. 406, 410, 658 P.2d 418, 419 (1983), plaintiff creditor was granted temporary custody of debtor's truck to mitigate damages in an action for contract and replevin. The Supreme Court vacated the preliminary injunction, noting that the court "determined substantive property rights and did not follow our statutes and rules directing the court to issue findings of fact and conclusions of law at the time he issued the injunction." See also Traders State Bank of Poplar v. Mann, 258 Mont. 226, 852 P.2d 604 (1992) where the Court vacated and remanded a preliminary injunction requiring bankrupt debtors to execute security documents for protection of the creditor because of the trial court's failure to make findings and conclusions.

3. "However, the extent of such findings and conclusions is necessarily dependent on the facts and circumstances of each case. Consequently, the litmus test in such cases is whether the District Court's order sets forth its reasoning in a manner sufficient to allow informed appellate review." Lake v. Lake County and City of Ronan, 233 Mont. 126, 134, 759 P.2d 161, 165 (1988). In Lake, the Court found the trial court's reasoning to be clear even though the findings and conclusions were not in the "recommended form."

D. Findings and conclusions are required as a basis for an order resolving a disputed probate proceeding. In re Estate of Murphy, 183 Mont. 127, 598 P.2d 612 (1979). "Although Rule 52, Mont. R. Civ. P. is seldom used in probate proceedings, we feel that it must be applied to the present fact situation so that this Court will know precisely the questions presented for appellate review." Id.

E. Findings and conclusions are required in jury trial if the court renders judgment notwithstanding the verdict. 89 C.J.S. Trial 612 (1955).

F. Findings and conclusions are not required on decision of motions for summary judgment.

1. Rule 52(a) provides:

> Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule. [Author's note: subdivision (c) covers judgment on partial findings.]

2. Because findings are used to resolve fact issues, they are not relevant to granting of summary judgment where no genuine fact issue exists. Hence, Simmons v. Jenkins, 230 Mont. 429, 436, 750 P.2d 1067, 1072 (1988)held findings and conclusions to be unnecessary for summary judgment, rejecting the implication of the majority and special concurring opinions in Big Man v. State, 192 Mont. 29, 626 P.2d 235 (1981), that findings and conclusions were required for summary judgment.

3. Where Rule 12 and 56 motions are granted, the rules require specification of grounds, if the order is appealable.

   a. "However, any order of the court granting a motion under Rules 12 or 56 which is appealable to an appellate court shall specify the grounds therefor with sufficient particularity as to apprise the

parties and the appellate court of the rationale underlying the ruling and this may be done in the body of the order or in an attached opinion." Rule 52(a)

b. In Ravalli County Bank v. Gasvoda, 253 Mont. 399, 833 P.2d 1042 (1992), the court reversed and remanded for failure to specify the grounds with sufficient particularity as required by the rule. See also Stepanek v. Kober, 191 Mont. 430, 431, 625 P.2d 51, 52 (1982) and Johnston v. American Reliable Insurance Company, 248 Mont. 227, 810 P.2d 1189 (1991).

c. Hence, since the court must specify grounds with sufficient particularity in any event, it would seem wise for prevailing counsel in summary judgment to prepare and ask the court to enter a form of findings and conclusions that fulfill the Rule 56 requirement of a specification of grounds with sufficient particularity.

d. Note that Drug Fair Northwest v. Hooper Ent., Inc., 226 Mont. 31, 33, 733 P.2d 1285, 1287(1987) said, "Because summary judgment is appropriate only where there are no issues of material fact, normally the making of findings of fact would indicate improper procedure on the part of the District Court." Obviously, to make findings appropriate, the court should, in place of the normal findings of fact, indicate that it is stating those essential facts which the court has found undisputed and which entitle the party to summary judgment as a matter of law.

II. What is a finding of fact?

A. "[T]he findings of fact required by Rule 52(a)is nothing more than recordation of essential and determining facts upon which the District Court rested its conclusions of law and without which the District Court's judgment would lack support." Barron v. Barron, 177 Mont. 161, 580 P.2d 936 (1978).

B. "Findings are a formal, deliberate statement of a court's determination of facts. . . . Findings of fact may be defined as the written statement of the ultimate facts as found by the court, signed by the court, and filed therein, and essential to support the decision and judgment rendered thereon." 75B Am.Jur.2d Trial Sec. 1968 (1992).

C. "A 'finding of fact' is a statement of the ultimate facts on which the law of the case must determine the rights of the parties, and is a finding of the

propositions of fact which the evidence establishes." 89 C.J.S. Trial Sec. 609 (1955).

D. "It is true that findings of fact can be based on reasonable inferences. However, [a]n inference must be founded (1) on a fact legally proved; and (2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." Lawrence v. Clepper, 263 Mont. 45, 57, 865 P.2d 1150, 1159 (1993).

III. What is a conclusion of law?

A. "'Conclusions of law' are those conclusions which the trial judge concludes from the ultimate facts." 89 C.J.S. Trial Sec. 609 (1955).

B. "The conclusions drawn by the trial court in the exercise of its legal judgment from the facts found by it are conclusions of law . . ." 75B Am.Jur.2d Trial Sec. 1970 (1992).

C. Conclusions of law are a record of the law applied at trial just as jury instructions are in a jury trial.

IV. Distinguishing the finding of fact from the conclusion of law.

A. Finding of fact defined: "A determination of a fact by the court, averred by one party and denied by the other, and founded on evidence in case." . . . "A conclusion by way of reasonable inference from the evidence." BLACK'S LAW DICTIONARY 632 (6th ed. 1990).

B. Conclusion of law defined: "Statement of court as to law applicable on basis of facts found by jury. Finding by court as determined through application of rules of law." BLACK'S LAW DICTIONARY 290 (6th ed. 1990). A conclusion of law is distinguished from a finding of fact in that it is arrived at through the application of a rule of law and not as a result of a process of natural reasoning. 89 C.J.S. Trial Sec. 649a (1955).

C. While a finding of fact and a conclusion of law are different, an ultimate finding of fact often may be read as a conclusion of law also.

1. In Holloway v. University of Montana, 178 Mont. 198, 201, 582 P.2d

1265, 1268 (1978), the issue was whether the University had "waived" the requirement that the plaintiff take and pass a particular class in order to graduate. The court, in finding for the University, apparently issued findings and conclusions that consisted of a single statement that the University had not waived the requirement. Plaintiff's appeal that the findings and conclusions were not adequate was rejected on the ground that the ultimate finding that the professor had not "waived" the MBA grade requirement (referring to the act or words of waiving) was also a conclusion of law that the University had not "waived" within the law of waiver. The court held that a statement of ultimate fact retains its character as such, although it could also be read as a conclusion of law.

2. In Brigham Young University v. Seman, 206 Mont. 440, 445, 672 P.2d 15, 18 (1983), the court held that whether consent to a lease assignment was unreasonably withheld was a determination that must be made as an ultimate fact. However, the court noted that, based on Holloway, the finding that the consent was unreasonably withheld might also be read as a conclusion of law and that "the statement does not thereby lose its character as a finding of ultimate fact because of such dual nature."

3. Drafting tip: If the statement of ultimate fact is, in form, also a conclusion of law, it should be stated in the findings and again in the conclusions, so that each is complete.

D. In Wheeler v. Carlson Transport, 217 Mont. 254, 704 P.2d 49 (1985), the court found that a statement denominated by the trial court as a "conclusion of law" was in substance a "finding of fact" that met the requirements of a finding on a critical issue. "The mere fact that it [was] improperly denominated [was] not dispositive." The court said, "The proper inquiry insofar as the sufficiency of the lower court's order is to determine whether within the body of that order the requisite elements are met." Id. at 263, 55.

E. Failure to specifically separate findings of fact and conclusions of law, in the absence of evidence of undue prejudice, did not constitute reversible error. Yellowstone Conference of the United Methodist Church v. D.A. Davidson, Inc., 228 Mont. 288, 295, 741 P.2d 794, 799 (1987). If the findings of fact and conclusions of law are clear, it is not substantial error that the findings are not listed separately and distinctly from the conclusions of law. Clemans v. Martin, 221 Mont. 483, 489, 719 P.2d 787, 789 (1986).

Drafting tip: These cases aside, the clear standard and requirement of Rule 52(a) is to separate findings from the conclusions.

V. **The purpose of findings of fact and conclusions of law.**

A. Stoddard v. Gookin, 191 Mont. 495, 625 P.2d 529 (1981) and Barron v. Barron, 177 Mont. 161, 580 P.2d 936 (1978), set out the three-fold purpose of requiring findings and conclusions:

1. They aid the trial judge's process of adjudication.

2. They are a record for purposes of res judicata and estoppel by judgment.

3. They are an aid to the appellate court on review.

B. "The purpose . . . is to enable the appellate court to examine the basis on which the trial court reached its ultimate judgment and to obtain a correct understanding of the actual issues determined by the trial court as a basis for its conclusions of law and judgment. . . . [It is] also intended to insure that the trial judge has dealt fully and properly with all the issues in the case before it is decided." 75B Am. Jur. 2d Trial Sec. 1969 (1992).

VI. **Relationship of findings, conclusions and order to judgment.**

"Findings of fact and conclusions of law do not constitute the judgment, but merely form the basis upon which the judgments are subsequently to be rendered." Reintsma v. Lawson, 223 Mont. 520, 524, 727 P.2d 1323, 1325 (1986).

VII. **Law and the drafting of findings and conclusions.**

A. Rule 52(a) requires that the court "find the facts specially" and "state separately its conclusions of law thereon."

B. Where the trial judge mixes findings and conclusions, the court has held that if the findings and conclusions are clear to the court, "failure to state them in the recommended form is not substantial error." Clemans v. Martin, 221 Mont. 483, 719 P.2d 787 (1986), citing, In re Marriage of Barron, 177 Mont. 161, 164, 580 P.2d 936, 938 (1978).

C. "It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court." Rule 52(a) Mont. R. Civ. P.

Practice tip (Submitted by Federal Judge Donald W. Molloy): For purposes of issuing findings and conclusions, the evidence will never be fresher than it is at

the end of the trial. Recess for an hour or so, confer with your clerk, and outline your ultimate findings of fact, conclusions of law and order. Return to the courtroom and recite your findings, conclusions and order on the record in front of counsel and the parties. This is the best and most convenient practice in most, but not all, cases. If it sounds unrealistic, consider that we expect lay juries to decide the case and issue their verdict at the close of the evidence in every case. This practice saves time and stress and provides the parties an immediate decision from a judge who recalls the evidence.

D. Insofar as the findings are the foundation for the judgment to be entered by the court, the foundation "need not consist of a multitude of evidentiary facts, but must be comprised of ultimate facts." Wareing v. Schreckendgust, 53 Mont. 1362, 930 P.2d 37 (1996). The court needs to make findings of ultimate facts and not evidentiary facts, and need not find evidentiary fact related to ultimate fact found against the party. Erickson v. Fisher, 170 Mont. 441, 442, 554 P.2d 1336, 1338 (1976); Barron v. Barron, 177 Mont. 161, 580 P.2d 936 (1978).

Example: In an action for negligence arising from a head-on auto collision, the court would find as ultimate fact that "defendant's automobile was in plaintiff's lane at the time of the collision" instead of reciting the rectangular coordinate measurements of defendant's tire skidmarks and the location of debris from defendant's automobile on the highway surface.

In a paternity case, the court might make an ultimate finding that respondent is the biological father of the minor child instead of reciting the laboratory findings resulting from comparison of blood samples.

E. The court is not required to outline in the findings all of the testimony presented at trial. Cherewick v. Cherewick, 205 Mont. 75, 83, 666 P.2d 742, 746 (1983); Lorenz v. Lorenz, 242 Mont. 62, 788 P.2d 328 (1990). The court need not address each piece of evidence. Tindall v. Konitz Contracting, Inc., 240 Mont. 345, 351, 783 P.2d 1376, 1380 (1989). "The district court need only set forth adequate findings and conclusions so that the reviewing court does not have to speculate as to the reasoning for the district court's decision." In re Seizure of $23,691.00 in United States Currency, 273 Mont. 474, ___, 905 P.2d 148, 153 (1995), citing, Tindall. "Thus the essential and determining factors upon which the court's conclusions rest are sufficient." Id.

F. "We require trial courts to make specific and accurate findings which consider all relevant factors." West v. West, 203 Mont. 469, 471, 661 P.2d 1289,1290 (1982).

G. The court is not required to make findings of fact which have no real relevance to the prime issue contested in the case, regardless of whether the evidence was

admitted. Montana Power Co. v. Kravik, 189 Mont. 369, 372, 616 P.2d 321, 323 (1980). In Montana Power Co., where the issue at the trial court was the contract meaning of the term "market price," the supreme court held it was not error for the trial court to refuse to make a finding about the effect of prospective costs if Kravik's interpretation were adopted, since that wasn't the issue. Id.

H. The court should not recite conflicting evidence, since conflicting findings don't reveal the evidence on which the trial court relied and will require remand to resolve conflicts in evidence. Wilmot v. Wilmot, 199 Mont. 477, 478, 649 P.2d 1295, 1296 (1982). Also, restating conflicting evidence means that the findings may support conflicting conclusions of law and thereby increase the chance of appeal on the ground that the judge drew the wrong legal conclusion. Restating conflicting evidence does not meet the rule's requirement to make findings. "Findings which restate conflicting evidence must also tell this Court how the trial court resolved that conflicting evidence." Wilmot at 478, 1296.

I. Correspondingly, if the court selects findings verbatim from each of the parties' proposed findings and conclusions, the court should make sure that they are not contradictory. Wilmot, at 479, 1297.

J. Accordingly, the court is free to disregard one expert's testimony in findings and adopt that of another. Rose v. Rose, 201 Mont. 86, 651 P.2d 1018 (1982).

K. Before it divides the marital estate, the trial court must make findings from which the net worth of the parties can be determined. Nunnaly v. Nunnaly, 192 Mont. 24, 26, 625 P.2d 1159, 1161 (1981); In re Marriage of Robinson, 269 Mont. 293, 888 P.2d 895 (1994). "A net valuation by the district court therefore is not always mandatory. Rather, 'the test is whether the findings as a whole are sufficient to determine the net worth and to decide whether the distribution is equitable'." In re Marriage of Stephenson, 237 Mont. 157, 772 P.2d 846 (1989) citing, Nunnaly.

L. Very general findings of fact and conclusions of law will support a judgment, when they substantially follow the allegations of the pleadings. Farmers St. Bank v. Mobile Homes Unlimited, 181 Mont. 342, 349, 593 P.2d 734,738 (1979).

M. The court should make specific findings upon all material issues of fact raised by the pleadings, followed by appropriate conclusions of law, indicating the judgment to be entered thereon. Bordeaux v. Bordeaux, 43 Mont. 102, ___, 115 P. 25, 28 (1911).

N. "Our ultimate test for the adequacy of findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence presented." Tomaskie v. Tomaskie, 191 Mont. 508, 625 P.2d 536 (1981); Wilmot v. Wilmot, 199 Mont. 477, 649 P.2d 1295 (1982).

VIII. **Trial counsel's process of preparing findings and conclusions.**

A. The drafting of findings and conclusions is an art.

B. There is a dearth of instructional materials available on the subject of preparing findings and conclusions.

C. The drafting of findings and conclusions presents the following challenges for trial counsel:

1. Casting the findings and conclusions as successive independent paragraphs(separate building blocks);

2. Casting findings and conclusions to allow separation and rearrangement, so that they stand, even if one is rejected;

3. Casting them to avoid rejection if attacked by one of the parties;

4. Casting in anticipation that the judge will, before trial, compare them with proposed findings and conclusions of opposing counsel to:

a. decide issues for trial, or

b. granting partial summary judgment in areas where the comparison shows there are no issues of fact;

5. Casting to anticipate and counter opponents proposed findings and conclusions;

6. Casting to adopt a judicial tone and style;

D. Trial counsel should adopt a process for preparing findings and conclusions. (F.E. COOPER, Writing in Law Practice 226 (1953).

1. Trial counsel should identify the facts relevant to the controlling issue.

2. Identify those facts that support counsel's contentions on the issue.

3. Identify those facts opposing counsel will rely on to support his or her contentions.

4. Decide the order in which the helpful and harmful facts should be stated.

IX. Findings and conclusions on appeal.

A. "This Court's standard of review of findings of fact is whether the findings are clearly erroneous. . . . A finding is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed." Estate of Flynn, 274 Mont. 199, 908 P.2d 661 (1995), citing, Interstate Production Credit v. DeSave, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991).

B. "We will not set aside findings of fact unless they are clearly erroneous and we will give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52, Mont. R. Civ. P." Kis v. Pifer, 179 Mont. 344, 350, 588 P.2d 514, 518 (1978).

C. In Estate of Tipp, 54 Mont. 90, 933 P.2d 182 (1997), the court rejected the "substantial credible evidence" test for estate cases at equity and confirmed that the "clearly erroneous" test would also apply in such cases as required under Rule 52(a).

D. The court will not find as "clearly erroneous" technical error in the findings that could have been corrected and is substantially supported by the evidence. Estate of Flynn, above, at 663. For example, where the finding reports the substance of the testimony correctly but attributes it to the wrong witness. Id.

E. If based on substantial though conflicting evidence, the findings must be upheld, unless the clear preponderance of the evidence is against such findings. Cameron v. Cameron, 179 Mont. 219, 227, 587 P.2d 939, 944 (1978).

F. Findings must be upheld if supported by substantial credible evidence. Carrocia v. Todd, 189 Mont. 172, 176, 615 P.2d 225, 227 (1980).

G. On review, the court can apply the doctrine of implied findings. Interstate Brands Corp. v. Cannon, 218 Mont. 380, 384, 708 P.2d 573,576 (1985); Department of Social and Rehabilitation Services v. Shodair Hospital, 273 Mont. 155, 902 P.2d 21 (1995). "That doctrine provides that where the 'findings are general in terms, any findings not specifically made, but necessary

to the [determination], are deemed to have been implied, if supported by the evidence.'" Id., State SRS v. Shodair. Where a court's findings are general in terms, any findings not specifically made, but necessary to the judgment, are deemed to have been implied, if supported by the evidence. Poulsen v. Treasure State Industries, 192 Mont. 69, 77, 626 P.2d 822, 827 (1981). The court will apply the doctrine only if not inconsistent with the express findings of the trial court. Id., State SRS at 155, 21, and Interstate Brands at 384, 576.

H. The test is whether the proposed findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence presented. In Re Marriage of Benner, 219 Mont. 188, 193, 711 P.2d 802, 805 (1985).

I. Where the determinative law is a statute which sets forth factors or elements that the court must consider, it is best to make specific findings on each of the elements.

1. For example, the court in In re Marriage of Jacobson, 228 Mont. 458, 743 P.2d 1025 (1987) said that its first inquiry in reviewing custody issues on appeal is to determine whether the factors set out in Mont. Code Ann. Sec. 40-4-212 were considered by the trial court.

2. However, the court in In re Marriage of Dreesbach, 265 Mont. 216, 875 P.2d 1018(1994), said, "The court is not required to make specific findings on each individual factor. (citation ommitted)" In In re Marriage of Converse, the court said, that, though it preferred that the trial court specifically address the factors listed in Sec. 40-4-212 in its findings, failure to do so was not always fatal. 252 Mont. 67, 70, 826 P.2d 937, 939 (1991). "However, failure by the trial court to at least consider all of the statutorily mandated factors is error. (citation ommitted)" Id. "The custody determination must be based on substantial evidence relating to the statutory factors and must be set forth explicitly in the findings." Id. The court in Converse noted that it had "refused to uphold an award of custody when the district court's findings indicated that not all of the statutory factors had been considered, even though the extensive record in the case indicated that the district court had received substantial evidence on each of the factors." Citing, In re Marriage of Keating, 212 Mont. 462, 689 P.2d 249 (1984).

4. **Conclusion**: Clearly, sound judicial practice in light of these pronouncements would be to make findings on each factor or element identified as determinative in a statute.

K. "The standard of review of a district court's conclusions of law is whether the

court's interpretation of the law was correct.(citation ommitted)" Estate of Parini v. Montana Department of Revenue, 279 Mont. 85, 926 P.2d 741 (1996)

X. **Adoption of counsel's findings and conclusions.**

A. "The court may require any party to submit proposed findings of fact and conclusions of law for the court's consideration and the court may adopt any such proposed findings or conclusions so long as they are supported by the evidence and law of the case." Rule 52(a) Mont. R. Civ. P.

B. "We again emphasize that we discourage the verbatim adoption of findings and conclusions presented by one of the parties to the litigation. West v. West, 203 Mont. 469, 470, 661 P.2d 1289,1290 (1982).

C. Wholesale adoption of findings and conclusions is disapproved, if they are unsupported by the evidence. Beck v. Beck, 193 Mont. 166, 631 P.2d 282 (1981)

D. Adoption of counsel's findings and conclusions is not reversible error in and of itself, provided they are supported by evidence and law. Baer v. Baer, 199 Mont. 21, 31, 647 P.2d 835,841 (1982). "We disapprove of wholesale adoption of proposed findings and conclusions." Id. However, "[w]hen the findings and conclusions are not clearly erroneous and are supported by the record, the judge has not abused his discretion by ratifying the proposals of one party." Lorenz v. Lorenz, 242 Mont. 62, 788 P.2d 328 (1990), citing, R.L.S. v. Barkhoff, 207 Mont. 199, 206, 674 P.2d 1082,1086(1983) saying, "We hold that the Barkhoff standard has been met." The test is whether substantial credible evidence exists to support the findings. In re Marriage of Bolt, 259 Mont. 54, 854 P.2d 322 (1993).

E. The standard of review is the same regardless of whether findings and conclusions are prepared by the court or adopted verbatim from counsel. Bowman v. Prater, 213 Mont. 459, 692 P.2d 9 (1984). They stand if supported by law and the evidence and may not be overturned unless clearly erroneous. In re Marriage of Hagemo, 230 Mont. 255, 749 P.2d 1079 (1988). "Findings and conclusions that are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and are supported by evidence will not be overturned simply because the trial court relied on proposed findings and conclusions submitted by counsel. (citation ommitted)" State v. Smith, 261 Mont. 419, 439, 863 P.2d 1000, 1012 (1993)

F. In Billings v. P.S.C., the court held it was not a breach of Rule 52(a) for the

trial court to adopt counsel's proposed findings verbatim, especially where the court invited both parties to submit findings prior to decision(as opposed to drafting by prevailing counsel). 193 Mont. 358, 631 P.2d 1295 (1981). "The losing party is entitled to know that he received the thoughtful consideration of the judge deciding the case rather than the partisan consideration of the attorney representing the other side of the lawsuit." West v. West, 203 Mont. 469, 661 P.2d 1289 (1982).

G. In City of Billings v. Public Service Commission, the court differentiated between cases where the court invited both parties to submit proposed findings and conclusions prior to making the decision, and cases where the court made the decision and then requested prevailing counsel to draft the findings. The court noted that "The latter practice has been disapproved by the United States Supreme Court. (citation ommitted)" 193 Mont 358, 365, 631 P.2d 1295, 1301(1981).

H. In Felton Inv. Group v. Taurman, the court approved adoption of counsel's findings and conclusions noting that they were "not completely verbatim, editing, selective use of conclusions, and reliance on the judge's own conclusions reflect thoughtful consideration of the judge deciding the case." 222 Mont. 238, 241, 722 P.2d 1135, 1137 (1986)

I. The test for verbatim adoption is "whether the proposed findings of fact are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence presented." In re Marriage of Benner, 219 Mont. 188, 192, 711 P.2d 802, 805 (1985).

J. Once adopted, findings and conclusions are the court's own. R.L.S. & T.L.S. v. Barkhoff, 207 Mont. 199, 674 P.2d 1082 (1983). In Barkhoff, the court merely photocopied counsel's proposed findings and conclusions.

K. **Conclusions for judges:**

1. The best practice is to review proposed findings and conclusions from both parties for the purpose of editing and selecting findings and conclusions that reflect your thoughtful consideration of the facts and law.

2. If counsel's proposed findings and conclusions are in substance what you would have prepared, it is not error to adopt them as the court's own. If counsel's proposed findings and conclusions are excellent, the court should not be barred from using them verbatim.

3. It is poor practice presenting greater risk of remand on appeal to solicit

proposed findings and conclusions only from prevailing counsel.

XI. Uniform District Court Rules on findings and conclusions.

A. Rule 8:

> In all matters where the court must enter findings of fact and conclusions of law pursuant to Rule 52, Mont. R. Civ. P., all parties shall file with the court, and serve upon opposing counsel, at least five days prior to the scheduled trial or hearing, proposed findings of fact and conclusions of law. Failure to file proposed findings of fact and conclusions of law in a timely manner shall be cause for appropriate sanction including removal of the case from the trial calendar, dismissal or granting of a judgment, precluding the offending party from presentation of evidence or objecting to evidence submitted by the other party, or such other action as the court deems appropriate. Post-trial amended and supplemental findings of fact and conclusions of law may be submitted in appropriate circumstances and only upon order of the court.

B. Rule 1 would include findings and conclusions as court "papers" requiring that they be double spaced or space-and-a-half and meet the standard format requirements set forth in the rule.

XII. Evidence of competent practice by trial counsel in preparing findings and conclusions.

A. Counsel will draft findings and conclusions during trial preparation. Doing so assists counsel in focus on the issues and assessing strengths and weaknesses of counsel's evidence and position.

B. Counsel use the preparation of findings to structure the case and select evidence.

C. Counsel coordinate the findings and conclusions with the allegations and legal positions set forth in pleadings and the pretrial order.

D. Counsel coordinate the findings and conclusions with the trial brief.

E. Counsel, in accordance with Uniform District Court Rule 8, submit findings and conclusions to the court in advance.

F. Counsel use preparation of findings and conclusions as a checklist of necessary evidence for an airtight record.

G. Counsel view findings and conclusions as a document that will persuade the appellate court.

H. Counsel analyze findings and conclusions during drafting to insure that they meet the standard of appellate review.

XIII. Amendment of findings and conclusions.

A. Mont. R. Civ. P. 52(b);

Upon motion of a party made not later than 10 days after notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Rule 52(b) Mont. R. Civ. P.

B. A change in the findings must be made based on a review of the evidence and not to make the findings conform to a desired legal conclusion. Marry v. Missoula County Sheriff's Department, 263 Mont. 152, 154, 866 P.2d 1129,1131(1993). In Marry, the court found as fact that the collision was caused equally by plaintiff and defendant and concluded that neither should recover. On plaintiff's motion to amend on the ground that, based on the finding, plaintiff was entitled to half her damages, the court changed the findings to show plaintiff as "primary" cause of the collision to justify the conclusion that plaintiff should recover nothing under the comparative negligence statute. The supreme court held it abuse of discretion to change the finding of fact to conform to the conclusion of law.

C. A judge who did not preside over the original bench trial may not amend the findings and conclusions without having the benefit of a transcript of the original proceedings. FIRS Holding Co., Inc. v. Lemley, 272 Mont. 490, 492, 901 P.2d 571, 573 (1995). It is the duty of the party who seeks amendment of the findings to order a transcript of the proceedings. Id.

D. The court may not consider matters outside the record in deciding a motion to amend findings and conclusions. Ring v. Hoselton, 197 Mont. 414, 643 P.2d 1165 (1982).

XIV. Masters and findings and conclusions.

A. Rule 53(a) provides that the district court may appoint "standing masters" and that "the court in which any action is pending may appoint a special master therein."

B. Rule 53(e) sets forth the requirements for reporting by the master:

1. In all matters in which the special master is required to make findings of fact and conclusions of law, the findings and conclusions shall be set forth in the master's report, filed with the clerk of court and served upon the parties. Mont. R. Civ. P. Rule 53(e)(1)

2. "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties."

3. Rule 53(e)(2) provides the court, after hearing objections to the master's report, may adopt, modify or reject the report, and, by implication, its findings and conclusions.

4. Under Rule 53(e)(3), in jury actions, any findings of fact by the master may be admitted into evidence subject to the trial court's ruling on objections.

XV. Conclusion

Findings of fact and conclusions of law are important tools with which trial counsel prepare the case for judge trial, assist the trial judge in the process of adjudicating the case, and aid the appellate court in review. The judge's selection, adoption, rejection or modification of the parties' proposed findings of fact and conclusions of law reflect the court's level of analysis and consideration of evidence. Preparation of findings and conclusions is an art which distills from trial the ultimate facts the court found to resolve the issues and the legal conclusions at which the court arrived when the judge applied the law to the ultimate facts. Well drafted findings of fact and conclusions of law reflect a high standard of judicial competence and provide a sound basis for appellate court review.

Summary Judgment Overview

1. Summary judgment is proper when the pleadings, supporting documentary evidence, admissions in open court, or supporting affidavits show no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P., provides in pertinent part that:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

2. The moving party must establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264, 900 P.2d 901, 903. Once the moving party has met its burden, the opposing party must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact. *Gonzales v. Walchuk* (2002), 312 Mont. 240, 243, 59 P.3d 377, 379. "Mere denials will not prevent an order for summary judgment." *Ponderosa Pines Ranch, Inc. v. Hevner* (2002), 311 Mont. 82, 87-88, 53 P.3d 381, 385.

3. The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. *Hughes v. Pullman*, 2001 MT 216, 306 Mont. 420,36 P.3d 339. However, "all reasonable inferences which may be drawn from the offered proof must be drawn in favor of the party opposing summary judgment." *Cape v. Crossroads Correctional Center*, 2004 MT 265, 323 Mont. 140, 99 P.3d 171. Where the movant has met its burden of showing that no genuine issues of material fact exist, the opposing party bears the burden of establishing an issue of material fact. The opposing party's facts must be material and of a substantial nature, and not fanciful, frivolous, or conjectural. *Fleming v. Fleming Farms, Inc.*, 221 Mont. 237, 717 P.2d 1103 (1986).

4. "If there is any doubt regarding the propriety of the summary judgment motion, it should be denied." *Emery v. Federated Foods* (1993), 262 Mont. 83, 90, 863 P.2d 426, 431.

5. Once a motion for summary judgment is filed, a formal cross motion is not necessary before a court may grant summary judgment in favor of a non-moving party. *Hereford v. Hereford* (1979), 183 Mont. 104, 107, 598 P.2d 600, 602.

> By great weight of authority, no formal cross-motion is necessary for a court to enter summary judgment. The invocation of the power o a court to render summary judgment in favor of the moving party gives the court power to render summary judgment for his adversary provided the case warrants that result. However, the court must be very careful that the original movant had a full and fair opportunity to meet the proposition, that there is no genuine issue of material fact and the other party is entitled to judgment as a matter of law.

Id. (citing 6 Moore's Federal Practice, P. 56.12, pp. 556-331 and 56-334.)

6. It is error to grant summary judgment without giving he opposing party reasonable opportunity to be heard. Unless the right to a hearing on a Rule 56 motion is specifically waived by all parties (hearing is not waived under UDCR 2 simply by failure to file briefs) either the movant or the adverse party are entitled to a hearing, unless the moving party is "clearly entitled" to summary judgment. *Cole v. Flathead County*, 236 Mont. 412, 771 P.2d 97 (1989).

7. Rule 56(c) M.R.Civ.P. allows a party to serve affidavits opposing a summary judgment motion "prior to the day of hearing," and a court may consider oral testimony given at a summary judgment hearing. Further, the 10-day time limit contained in Rule 2(a), UDCR does not apply to summary judgment motions. *Cole, supra.*, affirmed in *SVKV, L.L.C. v. Harding*, 2006 MT 297, 334 Mont. 395, 148 P.3d 584.

8. When a district court intends to treat a Rule 12(c) motion for judgment on the pleadings as a motion to dismiss as a motion for summary judgment under our Rules of Civil Procedure, it must first give notice to the parties of its intention to do so. *Gebhardt v. D.A.*

Davidson and Company, (1983), 203 Mont. 384, 661 P.2d 855; *First Federal Savings and Loan Ass'n of Missoula v. Anderson*, (1989), 238 Mont. 96, 777 P.2d 1281.

A. A Rule 12(c) motion for judgment on the pleadings is based on the contention that the moving party is entitled to a judgment on the facts of all the pleadings. It only entails an examination of the sufficiency of the pleadings.

B. A Rule 56(c) summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relevant to the merits of the challenged claim. The movant is asserting that based upon the record as it exists, there is no genuine issue as to any material fact and that he is entitled to judgment on the merits as a matter of law. Although a summary judgment can be made upon the basis of the pleadings alone; it functionally becomes the same as a motion to dismiss for failure to state a claim or for a judgment on the pleadings. 10 Wright, Miller & Kane, *Federal Practice and Procedure*, §2713, (1983).

9. In a two-party single claim situation, the granting of a summary judgment is a "judgment" within the definition of Rule 54(a) and appeal is proper. The situation may become more complicated in a multiple-party or multiple-claim litigation when summary judgment does not have the effect of terminating the entire lawsuit. Under Rule 54(b), the usual prerequisite for pursuing an appeal in multiple-claims suits, when there are unresolved claims, requires a final judgment.

A partial summary judgment that is entered in accordance with Rule 56(d) however, is an interlocutory order. Therefore, it is not appealable, unless certified under Rule 54(b). *Kohler v. Croonenberghs*, 2003 MT 260, 317 Mont. 413, 77 P.3d 531. [The District Court must clearly articulate the reasons and factors for certification as set forth in *Roy v. Neibauer*, 188 Mont. 81, and *Weinstein v. Univ. of Mont.*, 271 Mont. 435.]

10. The Montana Supreme Court reviews orders of summary judgment de novo. *Bradley v. Crow Tribe of Indians*, 2005 MT 309, 329 Mont. 448, 124 P.3d 1143.

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BENCHBOOK- CRIMINAL

SCRIPT FOR WAIVER OF EXTRADITION

1. Call the case. "Cause # _____ State v. _____. Let the record reflect that the Defendant is personally present [with his/her counsel, _____]. The State is represented by _____"

2. "Is your true name _____?"

3. "Do you have any physical or mental disability?"

4. "Do you understand English?" If not, appoint interpreter and continue to have them present.

5. If no attorney, "You have the right to an attorney. One may be appointed to you if you are eligible."
    a. If Defendant asks for attorney, ask him/her to fill out an application for the Office of the Public Defender.
    b. If Defendant is hiring an attorney, continue hearing to allow attorney to appear.
    c. If Defendant wishes to proceed pro se, refer to self representation section [and conditionally appoint the Office of the Public Defender].

6. If attorney is present, "Mr./Ms. Attorney, have you reviewed your client's rights with him/her?"

7. "A warrant for your arrest has issued from the State of _____ for the crime(s) of _____."

8. "Mr./Ms. [Defendant] you are advised you have the right to apply for a Writ of Habeas Corpus against your present detention."

9. "Mr./Ms. [Defendant] you are advised that you have the right to demand the issuance and service of a Warrant of Extradition from the Governor of the State of _____."

10. "Is it your intention to waive the issuance and service of all extradition proceedings and freely and voluntarily agree to return to the State of _____, to answer the criminal charge(s) pending there against you."

11. “Let the record reflect that the Defendant, acting under the advice of counsel is executing in the Court’s presence his/her waiver of extradition.”

12. “The County Attorney is instructed to provide a copy of the waiver to the Defendant.”

13. “The Defendant is to be returned before the Court on _____ [30 days] in the event the State of _____ has not come to get the Defendant.”

BAIL CONSIDERATIONS CHECKLIST

Release or Detention Considerations (§ 46-9-109, MCA)
Amount of Bail (§ 46-9-301, MCA, abridged)
Considerations:

Will the bail ensure the presence of the Defendant?
Will the bail ensure compliance with the conditions? (Safety of the community)
Is the amount of the bail oppressive?
What is the financial ability of the accused?

_____ 1. Nature and circumstances of the offense, including force or violence.

_____ 2. Weight of the evidence against the Defendant.

_____ 3. Defendant's character.

_____ 4. Defendant's physical and mental condition.

_____ 5. Family ties.

_____ 6. Employment.

_____ 7. Financial resources.

_____ 8. Property available as collateral for the Defendant's release

_____ 9. Length of residence in the community/community ties.

_____ 10. Past conduct.

_____ 11. History of drug/alcohol abuse.

_____ 12. Criminal history.

_____ 13. Appearance record.

_____ 14. Existing probation, parole, or other release pending trial, etc.

_____ 15. Danger to any person or the community.

CHECKLIST FOR CONDITIONS OF RELEASE
(§46-9-108 MCA)

_____ 1. Defendant must obey laws.

_____ 2. Defendant may be released into the custody of a person.

_____ 3. Defendant may be required to maintain or seek employment.

_____ 4. Limitations may be placed on Defendant's associations, abode, and travel.

_____ 5. Defendant's contact with the victim and witnesses may be limited.

_____ 6. Defendant may be required to report to the Court or other agency.

_____ 7. Defendant may be required to maintain a curfew.

_____ 8. Firearms or weapons possession or access may be limited.

_____ 9. Alcohol or drugs use may be limited. Defendant may not be allowed to be in the presence of others who are in possession.

_____ 10. Defendant may be required to post reasonable bail.

_____ 11. Defendant may be required to return to custody.

_____ 12. Defendant may be required to maintain contact with attorney.

_____ 13. Defendant may be required to attend all hearings.

INITIAL APPEARANCE SCRIPT § 46-7-101 MCA

1. An arrested person must by taken without unnecessary delay before the nearest and most accessible judge.

2. Call the case. "Cause # _____ State v. _____."

3. "The Defendant is informed (§ 46-7-102 MCA):

    a. The charge or charges against you is _____;

    b. You have the right to counsel;

    c. You have the right to have counsel assigned by a court of record, do you wish to have the aid of counsel?

        i. [If so, apply to the Office of the State Public Defender.]

    d. You may obtain pretrial release under the following conditions (setting of bail and/or conditions);

    e. You have the right to refuse to make a statement and the fact that any statement make by the defendant may be offered in evidence at your trial;

    f. A conviction may result in the loss of various rights regarding firearms under state and federal law; and

    g. You have the right to a judicial determination of whether probable cause exists if the charge is made by a complaint alleging the commission of a felony."

4. Set Bail with any appropriate conditions.

CHECKLISTS FOR ARRAIGNMENTS

_____ 1. The arraignment is being held in open court. (§ 46-12-201(1), MCA).

_____ 2. The Defendant's true name is on the Information order, or the Defendant's true name has been ordered substituted on the Information. (§ 46-12-201(2), MCA).

_____ 3. The Defendant's address, phone number, and other personal information have been confirmed as correct.

_____ 4. The Defendant is not under any disability that would prevent the Court – at its discretion – from proceeding § 46-12-201(3) MCA. If the Defendant is under a disability, the Court may continue the arraignment until the Defendant is able to proceed.

_____ 5. The Defendant understands English.

_____ 6. The Defendant has been informed that if he or she cannot afford to hire an attorney, the Court will order the Office of State Public Defender to represent the Defendant pending determination of eligibility. (§ 46-8-101, MCA).

_____ 7(a). The Defendant's counsel has been identified, OR

_____ 7(b). The Defendant will represent him or herself.

If the Defendant insists on self-representation, have the record show:

_____ A. The Defendant is literate.

_____ B. The Defendant is competent.

_____ C. The Defendant understands his or her decision.

_____ D. The Defendant is voluntarily exercising free will.

_____E. The Defendant understands the dangers and disadvantages of self-representation.

_____ 8(a). Defendant has confirmed that the signature on the Acknowledgment of Rights form is his/hers.

_____ 8(b). Defendant has acknowledged and understands the following:

_____ A. The nature of the charge or charges

_____ B. The mandatory minimum penalty, if any

_____ C. The maximum penalty including the effect of any penalty enhancement or special parole restriction

_____ D. The right to plead not guilty and persist in that plea.

_____ E. The right to a jury trial and at trial the right to assistance of counsel.

_____F. The right to a unanimous jury verdict.

_____ G. The right to confront and cross-examine witnesses against the Defendant.

_____H. The right to not be compelled to reveal personally incriminating information.

_____ I. The fact that the Court may not be bound by the plea agreement between the parties.

_____ J. The right to bail.

_____ K. The possibility of deportation if not a U.S. citizen.

_____ L. The consequences of a "Not Guilty" plea.

_____ M. The consequences of a "Guilty" plea.

_____ N. The Court's Plea Bargain policy (if the Court has adopted said policy).

_____ 9. The Defendant has been informed that an Information has been filed against the Defendant.

_____ 10. The Defendant has a copy of the Information.

_____ 11. The Defendant has read the Information, understands it and waives any further reading of the Information or have the Information read to the Defendant on the record or state the substance of the charge(s) contained in the Information (§ 46-12-201, MCA).

_____ 12. The Defendant has been informed that he/she has a reasonable time, not less than one day, to enter a plea. (§ 46-12-203, MCA).

_____ 13. The Defendant has been asked if he/she is ready to enter a plea (§ 46-12-203, MCA).

_____ 14(a). The Defendant enters a plea, <u>OR</u>

_____ 14(b). The Defendant has not less than twenty-four hours to continue hearing to enter plea.

_____ 14(c). The Defendant fails or refuses to enter a plea.

_____ A. The Court shall enters a plea of Not Guilty for any Defendant who fails or refuses to enter a plea. (§ 46-12-204(1), MCA)

_____ 15(a). The Defendant pleads Not Guilty – the Court enters the plea on the record and set a date for Trial and Omnibus hearing.

_____ A. Address the matter of bail.

_____ B. The Defendant has been informed of his/ her right to be present at the Omnibus hearing and the right to waive his/her presence at the hearing.

_____ 15(b). The Defendant pleads Guilty

_____ A. See Guilty Plea Checklist, P. 13.

ARRAIGNMENT SCRIPT

1. Call the case. "Cause # _____ State v. _____. Let the record reflect that the Defendant is personally present [with his/her counsel, _____]. The State is represented by _____"

2. "Is your true name _____?"

3. "Do you have any physical or mental disability?"

4. "Do you understand English?" If not, appoint interpreter and continue to have them present.

5. If no attorney, "You have the right to an attorney. One may be appointed to you if you are eligible."
   a. If Defendant asks for attorney, ask him/her to fill out an affidavit of indigence and application for appointment of the Office of the Public Defender and continue arraignment for one week to allow determination.
   a. If Defendant is hiring an attorney, continue arraignment to allow attorney to appear.
   b. If Defendant wishes to proceed pro se, refer to self representation section [and consider appointing standby counsel from the Office of the Public Defender].

6. If attorney is present, "Mr./Ms. Attorney, have you reviewed your client's rights with him/her"
   a. If there is an acknowledgment of rights signed by the Defendant [§ 46-12-210(2) MCA], order it filed and ask:
      i. "Mr. Defendant, have you reviewed this Acknowledgement of Rights with your attorney?
      ii. "Do you understand your rights?"
      iii. "Do you understand the charges against you?"
      iv. "Do you understand the maximum possible punishment?"
      v. "Have you received a copy of the information"

7. If the attorney is present but has not reviewed the Defendant's rights with him/her or there is no attorney, the Court advises the Defendant [§ 46-12-210(1) MCA]:
   a. "You are accused of _____."
   b. "The maximum penalty for this offense is _____, including the effect of any penalty enhancement provision or special parole

restriction. The mandatory minimum is _____. You may be responsible for restitution of costs and assessments provided by law"

If a youth, § 208 transfer hearing and trial as an adult.

If a non-citizen, conviction could result in deportation.

c. "Have you received a copy of the Information? Have you had an opportunity to review the document? Do you wish to have the County Attorney read the document to you? Have you had a chance to review the document with your/an attorney? Do you wish to have that opportunity?"
d. "You have the right to be represented by an attorney at every stage of this proceeding and, if necessary, one will be assigned to represent you."
e. "You have the right to plead not guilty or to persist in that plea if it has already been made."
f. "You have the right to be tried by a jury and at that trial have the right to assistance of counsel."
g. "You have the right to confront and cross-examine witnesses against you."
h. "You have the right not to be compelled to reveal personally incriminating information. You have the absolute right to remain silent."
i. "You understand that if you plead guilty or nolo contendere under a plea agreement, that the Court is not party to that plea agreement and is not required to accept the terms of the plea agreement and you may not be allowed to withdraw your plea."
j. "You understand that if your plea is accepted by the Court there will not be a further trial of any kind so you would be waiving the right to speedy trial."
k. "You understand that if you are not a U.S. Citizen, your plea might result in deportation or exclusion from admission to the U.S or denial of naturalization."

8. "If you so request, you will be allowed a reasonable amount of time -- not less than 1 (one) day to plead or otherwise answer (46-12-203, MCA)."
9. "How do you plead to the charges placed in the Information?"
   [If more than one charge, allow Defendant to plead to each individual charge.]
10. "The Defendant's Not Guilty plea to all charges is entered for the record. The Defendant will be set for trial at the next term of this Court."

11. Bail
    A. Amount?
    B. Conditions?
12. Trial date set
13. "Omnibus hearing is set for _____"[Must be set at least 30 days before the trial.]

CHECKLIST FOR A CHANGE OF PLEA (or Answer to Petition to Revoke Prior Sentence)

_____ 1. Review Plea agreement (or Prosecution's recommendation on Petition to Revoke) if one is offered? Terms?

_____ 2. Defendant's prior criminal history.

_____ 3. Victim's position regarding plea agreement. (Plea agreement only)

_____ 4. Swear in Defendant.

_____ 5. Accept plea agreement, remind Defendant the Court is not bound by plea, or reserve right to reject the plea and allow the Defendant to withdraw guilty plea. (Review § 46-12-211 M.C.A.-- Plea agreement only)

_____ 6. Defendant acknowledges the waiving of the rights.

_____ A. Defendant must go over plea agreement (or petition and report of violation) with attorney?

_____ B. Understand the plea agreement (or the allegation in the report)?

_____ C. Rights Defendant is waiting?

i. Advise the Defendant:

a. The right to remain silent and the right against self-incrimination.
b. The right to require prosecution to prove case beyond a reasonable doubt.*
c. The right to a fair, speedy and public trial including a unanimous jury verdict.°
d. The right to confront and cross examine the witnesses.
e. The right to present evidence on own behalf.
f. The chance to be found guilty of a lesser offense. (not in revocation)

* Only requires a "preponderance of the evidence" for parole violation.

° Or Adjudicatory hearing when Defendant is answering to a petition to revoke Defendant's suspended or deferred sentence

g. The right to challenge factual findings about your guilt.

h. The right to appeal any guilty verdict of a jury.

_____ D. Defendant understands the charge(s) (or violation(s) alleged)

_____ E. Lesser included charge(s) of _____.
(Plea agreement only)
–Discussed the lesser included charge(s) with attorney? and
–Plea of guilty waives the right to have the jury consider any lesser included charge(s)

_____ F. Under the influence of any medication, drugs or alcohol?

_____ G. Suffering from any emotional, physical or mental disability?

_____ H. Satisfied with your attorney?

_____ I. Sufficient time to go over the entire case with him/her?

_____ J. Anyone threatened with harsher punishment other than the maximum allowed by law did not plead guilty (or make admissions)?

_____ K. Law enforcement officer or member of the County Attorney's Office used force or duress against you to make plead guilty (or make admissions)?

_____ L. Any promises to you apart from the plea agreement? (Plea agreement only)

7. Defendant must state for the record the acts he/she committed that constitute the elements of the offense (or answer to the violations in the report of violation that supports the petition to revoke).

8. State the Court's findings for the record.

_____ A. Defendant is acting under the advise of competent counsel.

_____ B. Defendant understands his/her rights, the charges against him/her, and the possible punishment.

_____ C. Defendant is not under mental, physical or emotional defect or disability.

_____ D. Defendant is not under the influence of drugs or alcohol.

_____ E. No promises or threats have been made to the Defendant to cause him/her to enter a plea of guilty.

_____ F. Defendant is competent to aid in his/her own defense.

_____ G(1). Defendant admits to the factual elements of the crime, or

_____ G(2). Defendant believe there is a factual basis for the plea, the State could prove and a jury would find the Defendant guilty, and Defendant's plea of guilty is in his/her best interest, or

_____G(3). Defendant's admissions through his/her attorney are sufficient to the support the petition and the Defendant's deferred/suspended sentence is revoked.

_____ H. Defendant's plea/admissions is entered voluntarily, knowingly, and intelligently.

_____ 9. Accept the Defendant's guilty plea. (Plea agreement only)

_____ 10. Find Defendant guilty of __[state charges]__. (Plea agreement or guilty plea only) OR

_____ 10(a).Find that the Defendant's admissions thru counsel are sufficient to support the State's Petition to Revoke the Defendant's sentence. (Revocation only)

_____ 11. Order a presentence report. (Plea agreement only)

_____ 12. Set sentencing date.

SCRIPT FOR ANSWER TO PETITION TO REVOKE SUSPENDED/DEFERRED SENTENCE SCRIPT

1. "Calendar indicates that this matter is before the Court for the Defendant to respond to a Petition to Revoke his/her suspended/deferred sentence."

2. "The petition was filed on _____ and is based on a report of violation and affidavit in support dated _____."

3. "Is the Defendant prepared to proceed?"

4. To counsel, "Have you gone over the Defendant's rights with him/her?" (If not, you make use the Defendant's Query Checklist to inform the Defendant of his/her rights as follows at #8.

5. "Does the Defendant intend to make any admissions to the petition?"
   --If defendant denies, set the matter for adjudicatory hearing.

   OR

   --If so, have the Defendant sworn

6. "What is the maximum sentence allowed under this petition?"

7. "What is the recommendation of the State in this matter?"

8. "Will the Defendant please stand? Please raise your right hand and be sworn."

ASK THE DEFENDANT THE FOLLOWING QUESTIONS

_____ "You have filled out an acknowledgement of Rights?"

_____ "Have you carefully gone over this acknowledgement with your attorney?"

_____ "Are you satisfied that you understand the acknowledgement?"

_____ "Do you understand your the rights?"

_____ "Do you understand the violation[s] alleged in the petition and the report of violation?"

_____ "Do you understand that if you admit to any of these violations you are waiving certain of your rights including your right to remain silent and your right to an adjudicatory hearing on the petition?"

_____ "Do you understand that the State has the burden of proving these allegations by a preponderance of the evidence?"

_____ "Are you under the influence of any medication, drugs or alcohol?"

_____ "Are you suffering from any emotional, physical or mental disability?"

_____ "Are you satisfied with your attorney?"

_____ "Have you had sufficient time to go over the entire petition and report with him/her?"

_____ "Has anyone threatened you with harsher punishment other than the maximum allowed by law if you did not admit certain of these violations?"

_____ "Has any law enforcement officer or member of the County Attorney's Office used force or duress against you to make you admit to any of these violations?"

_____ "Has anyone made any promises to you apart from the recommendation?"

9. "To make your answer to the violations alleged in the petition as set forth in the report of violation, your counsel may assist you with questions."

10. If defendant admits, Court must make findings

"I find that:

_____ The Defendant is acting under the advice of competent counsel.

_____ The Defendant understands his/her rights, the allegations against him/her and the possible punishment.

_____ The Defendant is not under mental, physical or emotional defect or disability.

_____ The Defendant is not under the influence of drugs or alcohol.

_____ No promises or threats have been made to you to cause you to enter your admissions.

_____ The Defendant is competent to aid in his/her own defense.

_____ The Defendant's admissions are entered voluntarily, knowingly, and intelligently.

_____ The Defendant's admissions through his/her counsel are/are not sufficient to support the petition to revoke and the Defendant's suspended/deferred sentence is revoked."

11. If revoke: "Are the parties prepared to proceed to sentencing or does either party wish additional time to prepare for sentencing."

11(a). If not: "Petition is dismissed."

12(a). "Sentencing is set for _____." or

12(b). Impose sentence. See sentencing script.

CHANGE OF PLEA OR INITIAL PLEA OF GUILTY SCRIPT

1(a). "Is this Change of Plea pursuant to a Plea Agreement"

1(b). "The Acknowledgement of Rights and Plea Agreement is ordered filed."

OR

1(c). "This change of plea is not pursuant to a plea agreement."

2. "What information does the State have regarding the Defendant's prior criminal record?" (Plea agreement only)

3. "What is the position of the victim regarding the proposed plea agreement?" (Plea agreement only)

4(a). "Will the Defendant please stand? Please raise your right hand and be sworn."

5(a). "The Court advises that the Court has reviewed and accepts the Plea agreement."

OR

5(b). "You understand that the Court is not bound by any plea agreement."

OR

5(c). "The Court will require a Pre-Sentence Investigation before accepting or rejecting this agreement and will **or** will not allow you to withdraw your plea if the Court rejects the agreement's recommended sentence.

5(d). (If no attorney, advise of dangers and disadvantages of proceeding Pro Se and all rights in #8)

6. "Do you understand that in entering your plea of guilty, you are acknowledging certain rights you are waiving?

7. If plea agreement: "Have you carefully gone over this plea agreement with your attorney?"
   a. "Are you satisfied that you understand the plea agreement?"

8. "Do you know and understand the rights that you are waiving?"

If necessary when no attorney, no written acknowledgement of rights filed or you question the Defendant's understanding, specifically advise the Defendant of the rights following rights he/she is waiving:

A. The right to remain silent and to require prosecution to prove case beyond a reasonable doubt.
B. The right to a fair, speedy and public trial including a unanimous jury verdict.
C. The right to confront and cross examine the witnesses and to present evidence on own behalf.
D. The right against self-incrimination.
E. The chance to be found guilty of a lesser offense.
F. The right to appeal any guilty verdict of a jury.
G. The right to challenge factual findings about your guilt.

9. "Do you understand the charges against you?"

10. "There are lesser included charges of _____ which you could offer to a jury. If you were found guilty of those charges, they would result in a maximum sentence of _____. "

11. "Have you discussed the lesser included charges with your attorney?"

12. "Do you understand that if you plead guilty today, there will be no jury trial so there will be no jury and you can not be found guilty of these lesser included charges. So by entering your plea of guilty today you are waiving the right to have a jury consider any lesser included charges?"

13. "Are you under the influence of any medication, drugs or alcohol?"

14. "Are you suffering from any emotional, physical or mental disability?"

15. "Are you satisfied with your attorney?"

16. "Have you had sufficient time to go over the entire case with him/her?"

17. "Has anyone threatened you with harsher punishment other than the maximum allowed by law if you did not plead guilty?"

18. "Has any law enforcement officer or member of the County Attorney's Office used force or duress against you to make you plead guilty?"

19. "Has anyone made any promises to you apart from the plea agreement?"

20. "Before I accept your plea it is necessary that you state for the record what it is that constitutes the offense(s) to which you are about to plea guilty, your counsel may assist you with questions."

21. After the Defendant has allocuted, the Court must make specific findings:

"The Court finds:

b. The Defendant is acting under the advice of competent counsel;
c. The Defendant understand his/her rights, the charges against him/her and the possible punishment
d. The Defendant is not under any mental, physical or emotional defect or disability;
e. The Defendant is not under the influence of drugs or alcohol;
f. No promises or threats have been made to him/her to cause him/her to enter his/her plea of guilty;
g. The Defendant is competent to aid in his/her own defense."

22. a. "The Defendant has admitted to the factual elements of the crime;

OR

b. The Defendant believes there is a factual basis for the plea because after his/her review of the State's case against him/her it is likely that a jury would find him/her guilty, **and** his/her plea of guilty is in his/her best interest;

23. "His/her plea is entered voluntarily, knowingly, and intelligently."

24. "I accept the Defendant's plea of guilty and find the Defendant guilty of _____. I order a presentence report."

25. "Sentencing is set for _____."

(SAMPLE OMNIBUS HEARING FORM)
MONTANA _____ JUDICIAL DISTRICT COURT,
_____ COUNTY

STATE OF MONTANA,	)	CAUSE NO. _____
Plaintiff,	)	_____
-vs-	)	
	)	OMNIBUS HEARING
_____,	)	(§46-13-110, MCA)
Defendant.	)	and
_____	)	ORDER

Defendant (present) (not present).

A. DISCOVERY BY DEFENDANT:

1. The Defendant (has) (has not) requested disclosure by the prosecution pursuant to §46-15-322, MCA.
2. The State represents that it has made full discovery disclosure as requested by Defendant, except:

   _____

3. The State affirms it has disclosed all exculpatory evidence in its possession to Defendant.
4. The Defendant's motion for continuing discovery of all the foregoing is hereby granted including, but not limited to, discovery of any and all evidence the State intends to offer in its case in chief.
5. The Defense requests the following information, and the State answers:
   a) The State (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent. State vs. Just, notice provided by _____, or deemed waived.
   b) The case (does) (does not) involve an informant whose identity (has) (has not) been disclosed.
   c) There (has) (has not) been any electronic surveillance of any conversation to which Defendant was a party.
   d) There (was) (was not) a search warrant.

e) There (are) (are not) any issues of joinder of offenses or defendants. (§46-11-404, §46-13-210 and §46-13-211, MCA)

B. MISCELLANEOUS MOTIONS AND MOTIONS REQUIRING SEPARATE HEARING:

6. Any suppression motions pursuant to §46-13-301 and 302, MCA shall be filed, in writing, not later than _____ and shall be supported by brief and shall indicate whether oral argument or an evidentiary hearing is requested.

7. Any miscellaneous motions by the Defendant, including dismissal, claims of double jeopardy, change of place of trial, severance or to take a deposition shall be filed in writing, supported by brief not later than _____ _____. The State shall have ten (10) days following receipt of any such motion and brief in which to file an answer brief and the Defendant five (5) days to reply. Counsel shall indicate at the time of filing whether the matter is deemed submitted on briefs or whether oral argument is requested.

8. The Defendant (does) (does not) have any motion relating to the reasonableness of bail. (Title 46, Chapter 9.)

C. DISCOVERY BY STATE:

9. The Defense states that the general nature of the defense is general denial, putting the State to proof. In addition, the following statements are made by the Defense:

   a. There (is) (is not) any claim that the Defendant is not able to understand the proceedings or assist in the defense as a result of mental disease or defect. (Fitness to Proceed - §46-14-103, MCA.)

   b. The Defendant (will) (will not) rely on a mental disease or defect to prove that Defendant did not have a particular state of mind which is an essential element of the offense charged. (State of mind at time of offense; §46-14-102, MCA.)

   c. The Defendant (will) (will not) introduce evidence at trial of good character. (§46-15-323(2), MCA.)

   d. The Defendant will rely on the defenses of (alibi) (compulsion) (entrapment) (justifiable use of force) (mistaken identity). Written notice shall be provided by Defendant to Plaintiff within ten (10) days of this date. (§46-15-323(2), MCA.)

e. Upon filing of a written request by the State, the Defendant shall comply with the discovery provided for in §46-15-323 within the time therein provided. Request filed _____. Approved _____.

f. Other motions by the State:

_____

_____

g. Stipulations between the parties:

_____

_____

_____

h. Counsel request a trial setting before a 12-person jury. Estimated length of trial _____.

i. Defendant (waives)(does not waive) right to be present at drawing of the juror pool and (agrees)(does not agree) jurors shall be seated in the order drawn.

D. CONCLUSIONS:

10. Counsel state:

a) That Defense counsel makes no motion involving delay in arraignment, the Miranda Rule or illegal seizure or arrest, or any other constitutional problem, except as set forth above.

b) That State and Defense counsel have inspected this form and know of no other motions, proceeding or request which counsel decides to press, other than those checked hereon, and hereby waive all motions other than those set forth above.

DATE: _____

APPROVED:

_____

County Attorney

_____

Attorney for Defendant

SO ORDERED:

_____

District Judge

PROCEDURE FOR TRIAL OF CRIMINAL CAUSE

JURY TRIAL - Cause Number & captions (St. v. Defendant)

1. Clerk call roll of jury panel

2. Introduction of court officials including judge, clerk of court, court reporter, bailiff. Introduce counsel and have them introduce any party at their table.

3. Clerk swears all prospective jurors Oath #1:

   "You and each of you do solemnly swear that you will well and truly answer such questions as may be asked of you as to your qualifications to serve as a trial juror **during this term of Court**. So help you God?"

4. Judge inquires as to qualifications, MCA 3-15-301.

   a) Are any of you **not** a citizen of the United States?
   b) Are any of you **not** at least 18 years of age?
   c) Are any of you **not** a registered voter or a licensed driver or holder of a Montana identification card for _____ County?
   d) Are any of you **not** in possession of all your natural faculties?
   e) Do any of you **not** understand the English language?
   f) Do you have any physical disability that makes it difficult for you to get around or sit through trial?
   g) Have you ever been convicted of malfeasance in office or any felony or high crime for which your civil rights have not been restored?

5. Is the Plaintiff (State) ready for trial?
   Is the Defendant ready for trial?

6. Clerk calls from the list, in order, the number needed which is names of 12 prospective jurors plus total number of peremptory challenges . . . 6 each.
   Have bailiff seat, in the order called, twelve jurors in the jury box and another twelve across the front of the court room. Replace excused jurors from the remaining prospective jurors.

7. Oath #2 - Have all jurors in the courtroom rise. Clerk swears jurors:

   "Do you and each of you solemnly swear or affirm that you will make true answers to such questions as may be asked of you as to your qualifications to serve as a trial juror **in the case now at issue**? So help you God?"

8. Instruction # MCJI No. 1-004 & MCJI No. 1-001

9. Attorney for Plaintiff examines and passes jurors for cause (See §46-16-115 MCA)
   Attorney for Defendant examines and passes jurors for cause

10. Peremptory challenges (§46-16-116 MCA): 8 - in capital cases and 6 - in all others

11. Counsel stipulates that the 12 jurors in the box are the ones selected and that they are properly selected.

12. Oath # 3 - to selected jury to try the case.

    "You and each of you do solemnly swear that you will well and truly try the case now at issue and a true verdict render according to the evidence. So help you God?"

13. Alternate juror(s): (§46-16-118 MCA)

    a) Make entry after jury sworn of the need for alternate members.
    b) Select in same manner as principal jurors.
    c) Each party has one challenge for each alternate, e.g. for one alternate seat three jurors and each party has one peremptory challenge after both parties exercise challenges for cause.
    d) Swear alternates with same oath as jurors selected to try the case.
    e) Dismiss the rest of the prospective jurors.

14. The trial:

    a) Preliminary instructions [including MCJI No. 1-002, 1-003, 1-005]
    b) Preserve the record by giving the following admonishments or statements at all recesses:

i. “You are admonished not to converse among yourselves or with other people, or allow yourselves to be addressed by any other person, on any subject connected with this trial; and, not to form or express any opinion on the case, or any issue of the case until it is submitted to you. Do not talk at all to any witnesses, parties or their attorneys during the course of the trial.”

ii. When jurors return make a record that all are present or have counsel stipulate that all jurors are present.

c) Opening Statement
d) Statement of defense (or reserve to the opening of their case in chief or waive)
e) Plaintiff's case in chief
f) Defendant's case in chief
g) Plaintiff's rebuttal
h) Defendant’s surrebuttal
i) Jury view (§46-16-502 MCA for procedure and give a special instruction to jury re this)

15. Motions.

16. Settlement of instructions on the record in chambers or without jury present.

17. Charging the jury.

18. Final Argument.

19. Release alternates but they should be available until verdict is rendered and remain under admonishment until the verdict is reached.

20. Case submitted to jury for their deliberation - jury retires in custody of sworn bailiff with the exhibits, instructions and verdict form. (MCA § 46-16-504).

Oath to Bailiff:

“You do so solemnly swear that you will keep this jury together in some private and convenient place and permit no one to communicate with them or to personally do so yourself on any subject connected with the trial unless instructed to do so by the

Court. Nor will you ask them if they have agreed upon a verdict but return them into Court when they have so agreed and you are ordered to do so by the Court. So help you God?"

21. Remind attorney to keep the Court posted of their whereabouts while jury is out

22. Jury may come into Court for further instructions - counsel and court reporters there (§46-16-503 MCA for limitations)

23. Clerk calls roll of jury to see all present

24. "Ladies and Gentlemen of the jury, have you reached a verdict? Has the verdict been signed by the foreperson? Please provide it to the Bailiff who will deliver it to the bench."

25. Have the verdict handed to the Clerk of Court to be read. "You will file and record this as the verdict of the jury in this cause. Please read it to the jury."

26. "Ladies and Gentlemen, is this your verdict?"

27. Polling the jury: "As your name is called if that is your verdict, answer yes - if it is **not** your verdict, answer "no. The Clerk will call the roll of the jury.

"John Doe, is this your verdict?"

Criminal must be 12-0.
(Civil 2/3 - § 25-7-501 MCA)

28. If all – "so say you all?" If not all - 8 answer yes, 4 answer no, etc.

29. If Defendant is found not guilty: "The Defendant is hereby discharged and the information is hereby dismissed." [Unless the Defendant is detained in connection with other charges.]

30. If Defendant is found guilty: "The Defendant is adjudged as found by the jury. The Court orders a presentence report. Sentencing is hereby set for _____."

31. Dismiss the jury with instruction "You do not have to talk to anyone about your decision, but you may do so now if you choose." (see MPI2d 1.25 for example of releasing the jury after verdict)

32. Adjourn Court.

33. Other oaths
    a. View of the jury of the PREMISES § 46-16-502 MCA(Criminal)

        Oath to bailiff or Officer conducting jury:

        "Do you solemnly swear that you will conduct this jury to view the property or place which is the subject of this trial and which the Court has ordered viewed, and, that you will permit no one except one person representing each party, properly designated by the Court, to accompany the jurors, and that while absent you will permit no one to speak with the jurors on any subject connected with the trial except that the designated persons may point out the matters designated by the Court, so help you God?"

    b. Oath to Officer conducting jury to MEALS

        "Do you solemnly swear that you will conduct this jury to (Lunch) (Dinner) and that while you are thus absent you will not permit any person to speak to them on any subject connected with this trial, and, that after they have eaten you will return them into court, so help you God?"

SENTENCING CHECKLIST

1. Review Plea Agreement and decision to accept or reject it based on information contained in the PreSentence report which was not provided for the Court's consideration at the change of plea. § 46-12-211 MCA

2. Any changes or corrections to PSI?

3. Any witnesses for the State?
   State's recommendation for sentencing.

4. Any witnesses for the Defendant?
   Defendant's recommendation for sentencing.

5. Statement from the Defendant.

6. Is either party aware of any reason sentence should not now be imposed?

7. Review PSI:

* State charges for sentencing	* Juvenile criminal history
* Found guilty by trial or plea	* Adult criminal history
* Pretrial incarceration	* Nature of crime / instant offenses
*Court appt or retained counsel	* Defendant's & victim's statements
* Age	* Restitution owed
* Education	* Alcohol/chemical use
* Occupation	* Family background
* Marital status / children	* Motivation to reform
* Assets	

8. Follow PSI, State's or Defendant's recommendations.

9. Go to Form of Sentences.

10. Mandatory minimums (§46-18-205 MCA) & exceptions (§46-18-222 MCA)

11. Additional sentence – dangerous weapon (§46-18-221 MCA)

12. Non-violent offenders – imprisonment - § 46-18-225 MCA.

13. Fines and payment of costs. §§ 46-18-231 & 232 MCA.

14. Restitution - §§ 46-18-241 to 243 MCA.

15. Credit for incarceration before conviction § 46-18-403; *State v. Fisher*, 314 Mont. 222

16. PSI conditions 1-XXX are imposed. Any conditions must have a nexus to the crime but especially non-standard type conditions which haven't been imposed previously or are unique to the case.

17. Enroll in chemical dependency program within (90) days.

18. See APO before leaving court today.

Any bail is discharged and surety bond posted is exonerated.

SENTENCING SCRIPT

1. Call the case. "Cause # _____ State v. _____. Let the record reflect that the Defendant is personally present [with his/her counsel, _____]. The State is represented by _____."

2. "Are the parties prepared to proceed to sentencing?"

3. "Have both parties received copies of the Pre-Sentence Investigation Report dated _____?"

4. "Do either party have any additions or corrections?"

5. "What is the recommendation of the State?" (They may call witnesses if they choose)

6. "What is the recommendation of the Defendant?" (They may call witnesses if they choose)

7. "Will the Defendant please stand?"

8. "Is there anything further the Defendant cares to state to the Court?"

9. "Is there any reason why sentence should not be pronounced at this time?"

10. "It is the sentence and judgment of this Court that the sentence imposed is:
    a. The sentence contained in the plea agreement
       Or
    b. The sentence recommended by the State or by the Defendant or by the probation officer or decided by the Court."

11. "The Defendant is sentenced to:
    a. The Montana State Prison for a term of _____ years [with ____ suspended /or deferred. As conditions of the suspended/deferred sentence all of the conditions in the plea agreement on page ___ of the Presentence Investigation Report are incorporated by reference. As further conditions of the suspended/deferred sentence all of the conditions recommended

by the probation office on page ___ of the Presentence Investigation Report 1 through and including paragraph _____ are incorporated by reference."

OR

b. "The Defendant is committed to the Department of Corrections for a term of _____ years for placement in an appropriate facility or program with all but 5 years suspended. As conditions of the suspended portion of the commitment all of the conditions in the plea agreement on page ___ of the Presentence Investigation Report are incorporated by reference. As further conditions of the suspended commitment all of the conditions recommended by the probation office on page ___ of the Presentence Investigation Report 1 through and including paragraph _____ are incorporated by reference."

12. "The reasons for the sentence are" [be specific as the judges who sit at sentence review will need to know]:
"The sentence conforms to the Plea Agreement /or the recommendation of the State and/or the Defendant/or it is within the range set by the legislature for this crime.
It will provide restitution to the victim of the offense
It will provide punishment to the Defendant
And allow for his rehabilitation

13. "The County Attorney shall prepare the judgment and the Court will sign it. The Defendant is remanded to the custody of the _____ County Sheriff to be delivered to the Warden at the Montana State Prison **or** the Warden at the Montana Women's Correctional Facility **or** the Department of Corrections to serve his/her sentence."

FORM OF SENTENCES

Prison: That the Defendant shall be imprisoned in the Montana State Prison at Deer Lodge, Montana **or** the Montana Women's Prison in Billings, Montana for a period of _____ years. Parole Restriction: § 46-18-202 (state reasons)

Boot Camp: The Court recommends that the Defendant be considered for placement at the Treasure State Correctional Training Center at Deer Lodge, Montana

Department: That the Defendant shall be committed to the custody of the Montana Department of Corrections for a period of ____ years [unlimited term all but five (5) years must be suspended] for placement into an appropriate correctional facility or program. § 46-18-201(3)(d)(i)

I.S.P.: That the Defendant shall be imprisoned in the State Prison at Deer Lodge, Montana, for a period of ____ years, said sentence to be *suspended* on the following conditions:

(a) That the Defendant shall be committed to the Montana Department of Corrections and placed under the rules and regulations of the Adult Probation and Parole Bureau;

(b) That the Defendant shall enter and compete the Intensive Supervision Program;

(c) [Other]

All Deferred: That imposition of sentence is *deferred* for a period of _____ years [up to one year (1) for misdemeanor and three (3) for felony unless there is a financial obligation imposed then it is up to two (2) for misdemeanor and six (6) for felony] on the following conditions: [unavailable if Defendant was ever previously convicted of a felony. *See* § 46-18-201.]

All Suspended: That the Defendant shall be imprisoned [in the State Prison at Deer Lodge, Montana, or Montana Women's Prison at Billings, Montana] for a period of _____ years, said sentence to be *suspended* on the following conditions:

Partial Suspended: That the Defendant shall be imprisoned [in the State Prison at Deer Lodge, Montana or Montana Women's Prison at Billings, Montana] for a period of _____ *years, with* _____ *years suspended* on the following conditions (be sure that there is a nexus to the crime of which the Defendant is convicted):

(a) That the Defendant shall be under the supervision of the Department of Corrections of the State of Montana and shall obey all rules of probation;

(b) That the Defendant shall pay a probationary supervision fee pursuant to § 46-23-1031, MCA, on a schedule to be determined by the Probation Officer.

(c) That judgment is hereby entered against the Defendant and in favor or _____ in the amount of $____, plus a 10% restitution supervision fee as allowed by law [not less than $5.00];

(d) That the Defendant shall pay the statutory [§ 46-18-236] surcharge fee(s) in the amount of $_____, [$15.00 per misdemeanor and $20.00 per felony] plus $25.00 per charge for the statutory victim/witness surcharge [H.B. 405 effective 7/1/01];

(e) That the Defendant shall pay the Court Information Technology Fund fee in the amount of $5.00 ($10.00????). § 3-1-317

(f) That the Defendant shall repay the costs of the public defender/Court-appointed counsel in the amount of $_____;

(g) That the Defendant shall make all of the above payments to the DOC Collections Unit, _____, Montana on a schedule to be determined by the Probation Officer;

(h) That the Defendant shall obey all city, county, state and federal laws, all current court orders, and shall conduct himself/herself as a good citizen at all times;

(i) That the Defendant shall not own, possess, or control any firearms, ammunition, deadly weapons, explosives, or

destructive devices including but not limited to black powder weapons, black powder, or pyrodex;

(j) That the Defendant shall no possess or be in control of any scanners or other law enforcement monitoring devices while under the supervision of the Department of Corrections;

(k) That the Defendant shall not purchase, possess or consume any intoxicating beverages or enter any establishment where alcoholic beverages are the primary source of sales;

(l) That the Defendant shall submit to random blood, breath and/or urine screening tests for the presence of alcohol and/or drugs at the reasonable request of the Probation Officer without a Search Warrant;

(m) The Defendant's person, residence or vehicle may be searched at any time by lawful authorities in the manner provided by law when a probation officer has reasonable grounds to believe the search will disclose evidence of a probation violation;

(n) That the Defendant shall have no contact or communication, direct or indirect, with _____;

(o) That the Defendant shall pay a fine of $_____, payable to the Clerk of District Court of _____ County;

(p) That the Defendant shall pay a fine of $_____ [to the _____ County Drug Fund but be careful of assessments to anything that isn't statutory];

(q) That the Defendant shall repay the costs associated with the jury in the amount of $_____ payable to the Clerk of District Court of _____ County;

(r) That the Defendant shall pay the costs of confinement in the amount of $_____ payable to the Clerk of District Court of _____ County [currently $55.00/day];

(s) That the Defendant shall perform _____ hours of community service work and provide proof of completion to his/her Probation Officer. In the alternative, Defendant may make a

financial contribution to the District Court Improvement Fund in the sum of $_____ or any contribution thereof at the rate of $_____ per hour (up to one-half) [Again be careful of assessments to anything that isn't statutory];

(t) That the Defendant shall enroll, participate in and successfully complete the following programs and follow all treatment recommendations before consideration for any form of parole or participation in a supervised release program:

Cognitive Principles & Restructuring (CPR)

Criminal Thinking Errors (CTE)

Sex Offender Treatment I [and II]

Anger Management

(u) That the Defendant shall obtain a chemical dependency evaluation from a certified counselor and shall obtain any counseling or treatment deemed necessary by the counselor and Defendant's Probation officer, including inpatient treatment, as directed by the Probation Officer, all at his/her own expense;

(v) That the Defendant shall obtain a mental health evaluation and follow any treatment plan recommended, including but not limited to drug therapy, all at his/her own expense;

(w) The Defendant shall enter, participate in and successfully complete an Anger Management Program at his/her own expense;

(x) That the Defendant shall obtain Financial Management counseling as directed by the Probation Officer at his/her own expense;

(y) The Defendant shall no open or maintain a checking account at a financial institution while on probation;

(z) That the Defendant shall not gamble or frequent establishments featuring casino gambling;

(aa) That the Defendant shall make regular child support payments for the support of his/her children in compliance with any existing court or administrative orders or decrees;

(bb) That the Defendant shall complete a Job Corps Program which has been approved by the Probation Officer;

(cc) That the Defendant shall serve a period of _____ [up to six (6) months] in the _____ County Detention Center commencing _____.

(dd) That the Defendant is hereby committed to the Department of Corrections for placement in a pre-release program for a period not to exceed one year;

(ee) The Defendant is hereby committed to the Department of Corrections for placement at the Treasure State Correctional Training Center Program at Deer Lodge, Montana, provided he/she voluntarily enrolls and obtains Department of Corrections approval following a physical examination (available for sentencing after April 28, 1999);

(ff) The Defendant shall receive a total credit of _____ days for time served in detention prior to sentencing toward incarceration, fine, or both;

(gg) Any bail/bond posted is (discharged and surety) is hereby exonerated;

(hh) The Defendant is hereby remanded to the custody of the Sheriff of _____ County for transportation to the [State Prison] or [facility designated by the Montana Department of Corrections] for execution of this, the sentence and judgment of the Court.

SEXUAL AND VIOLENT OFFENDERS ONLY

(*See* § 46-23-502, MCA, for offenses for which this is applicable.)

1. That the Defendant shall register as a sexual [violent] offender pursuant to the Sexual or Violent Offender Registration Act; (*See* § 44-6-103 – are felonies under 45-5 or 9 (drug offenses) and burglary and agg. _____

2. That the Defendant shall provide a biological sample to be drawn by qualified medical personnel designated by the [_____ County Sheriff] or [Department of Corrections] for DNA analysis, [§ 44-6-103, MCA];

3. That the Defendant shall be designated as a:

   (a) Level 1 offender (low risk to re-offend sexually) – available only to law enforcement

   (b) Level 2 offender (moderate risk to re-offend sexually) dissemination authorized

   (c) Level 3 offender (high risk to re-offend sexually) Sexually violent predator (requires concurrence of evaluator)

4. That the Defendant shall receive chemical treatment, (optional) [*See* § 45-5-512, MCA];

5. That the Defendant shall pay for any and all counseling costs arising from his/her offense, including transportation, accrued by his/her victim;

6. That the Defendant shall not be involved in any type of employment, service or recreational pursuits or any other activity which involves the supervision of minor children. Under no circumstances should the Defendant be in a position of power and authority over minor children;

7. That the Defendant shall not access the Internet, have any pornography in his/her possession, enter adult bookstores, or enter establishments where nude and/or exotic dancing is promoted;

8. That the Defendant shall complete the Sex Offender Treatment Program at the Montana State Prison prior to release on probation or parole or into any community setting;

9. That the Defendant shall enroll, participate in and successfully complete a sexual offender treatment program which has been approved by the Probation Officer at his/her own expense;

10. That the Defendant shall not associate or communicate, directly or indirectly, with juveniles under the age of 18 without a responsible adult present who has been approved in advance by the Probation Officer;

11. That the Defendant shall not attend, frequent or visit places where children congregate, including but not limited to parks, playgrounds, schools, or video gaming parlors;

12. If victim was a minor or if Defendant (is a Level 3 Offender) the Defendant shall not reside within _____ feet of a private or public elementary or high school, preschool, licensed day care center, church, or park maintained by a city, town, or county (§ 6-18-255(2) MCA).

D.U.I. OFFENSES ONLY

1. That the Defendant's driver's license and/or privileges shall be suspended or revoked as determined by the State of Montana Department of Motor Vehicles. The Court does not recommend that the Defendant receive a probationary license;

2. The Defendant shall not operate or be in physical control of a motor vehicle for a period of _____.

3. That the Defendant shall enroll, participate in and successfully compete the ACT program within _____ months of this date at his/her own expense;

4. That the Defendant shall enroll in and successfully complete (one (1) day, four (4) hours, City Hall) the Court Referral Defensive Driving Class at his/her own expense and shall submit certification of completion to the Court;

5. That the Defendant shall install an ignition interlock device at his/her own expense.

6. [Review authority to forfeit vehicle]

CHECKLIST FOR REFUSAL OF LEGAL COUNSEL

1. REPRESENTATION BY LEGAL COUNSEL
   - A. You have a constitutional right to assistance of legal counsel, i.e., a licensed attorney at law.
   - B. If you are unable to afford legal counsel, but desire same, counsel will be provided to you at public expense if you submit an application showing that you are indigent which is then approved by the Court.
   - C. You have rejected legal counsel, but I must make certain your rejection is knowing and intelligent.
   - D. Questions:
     - i. Age
     - ii. Mental condition
     - iii. Legal experience
     - iv. Nature of charges
     - v. Consequences of conviction
     - vi. Alcohol/drug use history
     - vii. Inherent disadvantages:
       1. judgment may be clouded
       2. criminal procedure code and case law apply
       3. rules of evidence apply local and uniform court rules
       4. same rules apply to non-lawyers and lawyers
   - E. Disruptive or disorderly conduct WILL NOT BE TOLERATED. Self representation is not a license to abuse the dignity of the courtroom.
     - i. Contempt of court – jail and fine
     - ii. Removed from the courtroom and lose right to self-representation
     - iii. Bound and gagged and allowed to remain
     - iv. Right to remain silent
   - F. If you represent yourself, you have no right to representation by or counsel during court with an individual who is not admitted to practice before this Court under the rules of the Montana Supreme Court.
2. DETERMINE on the record if Defendant's waiver of counsel is knowing, intelligent and unequivocal. If so, allow Defendant to proceed pro se **BUT appoint stand-by counsel.**

3. ROLE (of stand-by counsel) – licensed attorney to aid and assist Defendant if and when Defendant requests help and to be available to represent Defendant if the need arises.
4. UNDERSTAND that you may employ legal counsel at any time or you may apply for appointment of counsel in which case you will need to file a financial statement on a form available from the Clerk of Court.
5. JUVENILE CASES (§ 41-5-1413 MCA)
   A. Youth and parents must waive counsel
   B. NO waiver allowed if the youth may be committed to the Department for more than 6 months.

PRO SE PARTY

The Court will now tell you about some of the dangers and disadvantages of representing yourself.

You will have to abide by the same rules in court as lawyers do.

Even if you make mistakes, you will be given no special privileges or benefits and the judge will not help you.

The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures.

Unlike the prosecutor you will face in this case, you will be exposed to the dangers and disadvantages of:

(a) understanding the elements of the charges against you,
(b) not knowing the complexities of jury selection,
(c) what constitutes a permissible opening statement to the jury,
(d) what is admissible evidence and the rules of criminal procedure,
(e) what is appropriate direct and cross examination of witnesses,
(f) what motions you must make and when you make them during the trial to permit you to make post-trial motions and protect your rights on appeal,
(g) what the appropriate jury instruction may be and how to argue them,
(h) what constitutes appropriate closing argument to the jury.

SCRIPT FOR MENTAL CAPACITY
Or for child witnesses

Sample Questions:

Name?
How old are you?
When is your birthday?
What do you remember about it?
Can you read?
What do you read?
Do you watch TV?
What types of shows do you watch?
Know what it means to tell the truth?
Explain.
Know what it means to tell a lie?
Explain.
Have you ever told a lie?
Do you think it is ever ok to lie?
If I ask you to promise to tell the truth, will you do that?
Do you understand the purpose of oath to tell the truth?
With promise to tell truth, that means not to hide anything. You have to tell everything you remember. Understand?

CHECKLIST FOR BATSON CHALLENGE

The challenge must be done before jurors sworn and venire dismissed:

1) Defendant must show that he/she is a member of a cognizable racial group.

2) Defendant must show that prosecutor exercised preemptory challenge to remove members of Defendant's race from the venire.

3) Defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used the preemptory jury selection practice to exclude members of the venire from the petit jury on account of their race.

4) If Defendant raises, prosecutor must provide race-neutral explanation.

5) The Court must make findings in either case

6) If challenge successful:
    a. discharge venire and select new panel
    b. disallow discrimination challenges

CHECKLIST FOR COMPLAINTS
RE: INEFFECTIVE ASSISTANCE OF COUNSEL

1. The Court must make an adequate initial inquiry as to whether the Defendant has "seemingly substantial complaints" about his court-appointed counsel.

2. If the Court determines that the Defendant has presented "seemingly substantial complaints," then a hearing must be held to address the validity of those complaints.

CONTEMPT

INTRODUCTION

Recommendation: 1) Strive to conduct court inviting compliance rather than imperiously demanding it. Most persons will react favorably to a request, often even when fired by unreasonable passion. 2) A recess (10 minutes or 10 days) can allow everyone, including the judge, an opportunity to cool off. No one can insult the Court in person or interfere with a hearing when Court is not in session and the judge is not present.

Acts or Omissions that Constitute Contempt
Section 3-1-501 M.C.A.

- Disorderly, contemptuous or insolent behavior towards a Judge that interrupts a trial or other proceeding.
- Breach of the peace, boisterous conduct or violent disturbance interrupting a trial or other proceeding.
- Misbehavior in office, etc., by attorney, clerk, sheriff, or other official.
- Deceit or abuse of process by a party.
- Disobedience of a lawful order, judgment, or process of the Court.
- Acting as an attorney without authority.
- Rescuing a person or property in the custody of an officer.
- Unlawfully detaining a witness.
- Refusing to be sworn or answer as a witness or a party.
- Disobedience of a duly served subpoena.
- Neglecting to appear or serve as a juror when summoned.
- Improper communication by summoned juror.
- Disobedience by lower Court.

Other Acts or Omissions

- When an application for an order is refused in whole or in part or granted conditionally and a subsequent application is made to another judge. There are limitations to this being considered contempt. *See e.g*. Section 3-1-502 M.C.A.

- When a person evicted from a parcel of real property attempts to reenter or takes possession of the real property. This also applies to persons who aid and abet the evicted person. *See e.g*. Section 3-1-504

- Abusive pleadings. *Malee v. District Court for the Second Judicial District*, 275 Mont. 72, 911 P.2nd 831 (1996).

- There are a variety of statutorily prescribed contempts. For example re: abortion reports (Section 50-20-306 MCA) re: aeronautics investigations (Section 67-2-502 MCA); practicing law without a license (Section 37-61-210 MCA); to refuse to deliver a will to court (Section 72-2-536 MCA), re: termination of a guardianship (Section 72-5-325 MCA), etc.

- A compilation of cases is attached.

Traditional nomenclature includes distinctions between "direct" or "indirect" and "civil or criminal." "Direct" contempt suggests that the Court is authorized/required to act summarily. "Indirect" suggests a more deliberate process. However, *Malee v. District Court for the Second Judicial District*, 275 Mont. 72, 911 P.2d 831 (1996) concluded that one type of direct contempt is not susceptible to summary proceedings. Therefore, it is not possible to conclude that a direct contempt will allow summary proceedings in all cases. It is recommended that the presiding judge first determine whether the situation is urgent or non-urgent. That decision will assist to determine whether proceedings may be summary or must accord greater due process. "Summary contempt procedure must be used only in instances . . . which . . . require[ ] immediate

action to vindicate the authority of the court. *Kaufmann v. Twenty-First Judicial District Court,* 1998 MT 239, 291 Mont. 122, 966 P.2d 715 (1998).

DIRECT/INDIRECT CONTEMPT

Generally, those situations which develop in the immediate view and presence of the court or judge at chambers (including pleadings, *Malee, supra*) are direct contempt. Generally, all other contempts are indirect.

Direct Contempt

Acts or statements made in open court or within the purview of the presiding judge. "[C]ontemptous pleadings and briefs presented to the Court also are direct contempt in that they are in the immediate view and presence of the court or judge at chambers." *Malee v. District Court for the Second Judicial District*, 275 Mont. 72, 76, 911 P.2d 831, 833 (1996). There does not appear to be any explicit authority preventing the presiding judge from acting on issues of direct contempt. However, *Kaufmann* at p.132 cautions that non-urgent issues must be heard by a "neutral" judge.

<u>Summary Proceedings in Direct Contempt</u>

1. A District court may subject a contemnor to summary proceedings only when it is necessary to restore order, maintain the dignity or authority of the Court, or prevent delay. Section 3-1-511 M.C.A.
2. Before an order is issued the contemnor:
    a. Must have been informed of the contempt; and
    b. Must have been given an opportunity for allocution. Allocution is the opportunity to defend or explain the contemptuous conduct.

3. The summary punishment order must recite:
    a. the facts that occurred in the Judge's immediate view and presence;
    b. that immediate action is necessary;
    c. that contemnor was informed of the contemptuous conduct;
    d. that contemnor was given an opportunity to defend or explain the conduct;
    e. the contemnor's guilt of contempt; and
    f. the punishment.
4. A person adjudged guilty of criminal contempt under Section 3-1-511 M.C.A:
    a. May be fined $500.00; or
    b. May be imprisoned for 30 days; and
    c. May be subject to any other reasonable conditions the Court deems appropriate.

Non-Summary Procedure for Direct Contempt

1. Summary proceedings are not allowed absent "urgency." "Urgency considerations generally do not exist in this species of direct contempt." *Kaufman v. Twenty-First Judicial District*, 291 Mont. 122, 130, 966 P.2d 715, 720 (1998) (contemptuous pleadings and briefs).
2. The contemnor is entitled to a hearing before a neutral judge during which the contemnor:
    a. is advised of the charges against him or her;
    b. has a reasonable opportunity to meet them by way of defense or explanation;
    c. has the right to be represented by counsel;
    d. has a chance to testify and call other witnesses on his behalf; and

e. in instances in which criminal punishment is a consequence, a finding of guilty beyond a reasonable doubt."

Id. at 132. The case also requires "the affidavit or statement of facts procedure set forth in §3-1-512 MCA." *Id.*

Indirect Contempt

"Is contumacious behavior occurring beyond the eye or hearing of the court and for knowledge of which the court must depend upon the testimony of third parties or the confession of the contemnor." *Malee* at 833. "Indirect contempt is often a matter of a party not following a court's order." Id at 332.

Non-Summary Procedure for Indirect Contempt
Section 3-1-512 and 518

1. An affidavit reciting the facts constituting contempt must be presented to the Court.
2. A warrant may be issued to bring the person to answer to the charge. If a warrant is issued:
    a. the warrant must be accompanied by a statement of the charge; and
    b. the answer to the charge must be followed by a hearing.
3. If a person is arrested for indirect contempt and has appeared or been brought before the Court the Court must:
    a. proceed to investigate the charges;
    b. schedule and hold a hearing
4. At the hearing the Court:
    a. must hear any answer the person arrested may make toward the charges; and
    b. may examine witnesses for or against the person charged.

5. The charged person must have a reasonable opportunity to obtain counsel and prepare a defense prior to the hearing.
6. At the hearing charged person may:
    a. testify; and
    b. call witnesses
7. The Judge investigating the charge and presiding over the hearing may not be the judge against whom the contempt was allegedly committed EXCEPT when the contempt arose from violation of a Court order issued after a hearing on the merits of the subject of the order.
    a. unless it is shown the judge would not be impartial in addressing the contempt; and
    b. due process protections are met.

    See, e.g., Drew v. Mont. Tenth Judicial District, 321 Mont. 520, 533, 92 P.3d 1195, 1203 (2004), *and* Section 3-1-518(1) M.C.A. (the Court initiated the contempt proceedings by issuing an order to show cause why contemnor had not complied with previous orders; counsel for Drew did not assert that the presiding judge would not be impartial).
8. Presumably the judge who issued an order should be able to preside over contempt proceedings regarding that order when those proceedings are initiated by one of the parties. The judge has no personal stake in allegations of contempt; the judge serves in the usual capacity as neutral arbiter between competing interests.
9. For specific procedures regarding bail, arrest and detention and warrants see Section 3-1-514-522 M.C.A.

CIVIL/CRIMINAL CONTEMPT

Contempts are neither wholly civil nor wholly criminal, but classification of a contempt as one or the other is important, because the classification determines the procedures the court must follow. *Huffine v. District Court*, 285 Mont. 104, 945 P.2d 927 (1997). In order to properly characterize criminal or civil contempt the District Court must determine the purpose it seeks to further by imposition of the sanction. The mere fact of incarceration and/or fine does not define the type of contempt. It is the purpose of the punishment and the opportunity or lack of opportunity for contemnor to end the punishment which is dispositive.

Civil Contempt

A contempt is civil if the sanction is imposed to obtain compliance with a court order. The contempt is civil if the contemnor can end the incarceration or fine by complying with a court order. In civil contempt the contemnor "carries the keys to the jailhouse in his pocket." *Id*. at 109. Even though the contempt order may require a fine or incarceration or both, the contempt is civil when the contemnor can end the penalty by complying with the court's order.

If the Court's purpose in imposing the sanction is to compel the performance of an act, the court shall impose the sanction under Section 3-1-520 M.C.A.

The contemnor may be subjected to:

a. incarceration;

b. fine not to exceed $500.00; or

c. both until the contemnor has performed the act.

The Court's sentencing order must clearly state:

a. an act the contemnor is able to perform; and

b. performance will secure his release and/or extinguish payment of the fine.

A jury trial is not required. *Commission on Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 197 P.3d 200.

There also appears to be a concept which might be described as compensatory civil contempt. In *Hanley v. Lanier*, 2002 Mont. 214, the Supreme Court affirmed without discussion a District Court award of $5,000 in damages to the "victim" of conduct which violated an injunction issued by the Court. It did so without reference to *Lilienthal v. District Court*, 200 Mont. 236, 650 P.2d 779 (1982) which held that there was no express authority for compensatory damages in contempt actions. Section 3-1-519 MCA which the Court analyzed in *Lilienthal* was repealed in 2001.

Criminal Contempt

A contempt is criminal if the court's purpose is to punish the contemnor for conduct which has already occurred and to vindicate the authority of the court.

Direct (Urgent) Criminal Contempt

A Court has the inherent power to summarily punish a contemnor of criminal contempt *(See e.g. Summary Punishment of Direct Contempt pg. 2*) pursuant to Article VII, Section 1 of the Montana Constitution and Section 3-1-501 M.C.A.

Indirect (Non-Urgent) Criminal Contempt

A contemnor may be charged with misdemeanor criminal contempt pursuant to Section 45-7-309 M.C.A. A criminal charge is initiated by and prosecuted in the discretion of the prosecutor independent of judicial decision. It "is totally independent of the case in which the contempt arose. The contemned court's jurisdiction does not extend from the original case to this new and independent matter." *State v. Abrams*, 209 Mont. 508, 509-510, 680 P.2d 585, 586 (1984).

Huffine, supra, concluded that criminal contempt could result in incarceration only upon prosecution of a crime. *Id*. at 111. The case was decided in part by differentiating between Sections 3-1-519 MCA and 3-1-520 MCA. Section 3-1-519 MCA was repealed in 2001. Section 3-1-520 MCA was modified. Sections 3-1-501 and 3-1-511 also were modified. All were amended by Chapter 496. The essence of the changes were to prescribe procedure depending on urgent or non-urgent status.

It appears that a judge simply may not punish past contemptuous conduct (contrasted with sanctions to coerce compliance) unless it involves direct contempt. Punishment for indirect past contemptuous conduct must be sufficiently egregious to motivate a prosecutor to charge a criminal offense.

JUDGMENT and "APPEAL"

1.) Judgment and orders in contempt cases are final.

2.) There is no appeal from contempt judgments except for certain family law situations. *See e.g.*, Section 3-1-523(2) M.C.A., Appellate Rules of Procedure 6(3)(j).

3.) The exclusive method of review of contempt orders in civil proceedings is by way of a writ of *certiorari* or writ of review.

4.) The standard of review is whether the decision is supported by substantial evidence. *Lee v. Lee*, 2000 MT 67, 299 Mont. 78, 966 P.2d 389.

DN – Order To Show Cause
Rights and Procedures Colloquy
Required by § 41-3-432(4), MCA (2005)

This is a show cause hearing. Statutes require that you be given an outline of your rights and of the procedures that will be used in an abuse and neglect process. In addition, this Court will likely receive brief testimony in order for it to make findings pursuant to § 41-3-432(5), MCA (2005).

This hearing is a first step in a process that has been initiated in this Court by the County Attorney's Office by the filing of their Petition for___(Investigatory Authority, TLC)____. That process essentially means that the Department has concerns about possible abuse and/or neglect of your child(ren).

You have the right to contest the allegations contained in the Petition. You have a right to bring witnesses on your own behalf and to question any witnesses brought by the State. If you believe you cannot afford it, the Court will appoint counsel for you. It is essential, even at this early stage in this matter, that you understand fully your legal rights.

This hearing will be followed within 90 days by what is known as an Adjudicatory hearing – a hearing where the Department must prove the allegations contained in the Petition by a preponderance of the evidence. At that Adjudicatory hearing, you also would have the right to challenge the allegations contained in the Petition, to call witnesses and to question witnesses called by the State. You would have the right to be represented by counsel.

If, at that hearing, this Court finds that the allegations of the Petition have been proven, the child(ren) will be declared youth in need of care. Then the Department will work with you in a process which would include what we call a Service Treatment Agreement. This Agreement outlines various actions and steps that the Department would ask you to take in order to ensure that you provide the best environment that is safe for your child(ren) and provides for their best interests.

One of the things you should know right off is that our goal as a Court and on behalf of the State is the best interests of your child(ren). We do not look at your best interests, only your child(ren)'s best interests.

It would be your responsibility to work with the Department to comply with the terms of that Service Treatment Agreement. What is requested of you in that Agreement is to some degree open for negotiation or objection by you and your legal counsel. If the Department asks you to comply with certain steps and you don't believe that those are related to the underlying allegations or you don't believe that they relate to you as parents or are in the best interests of your child(ren), then you could, through your counsel, object and the Department might agree. They might disagree. If there is a conflict, then this Court resolves it.

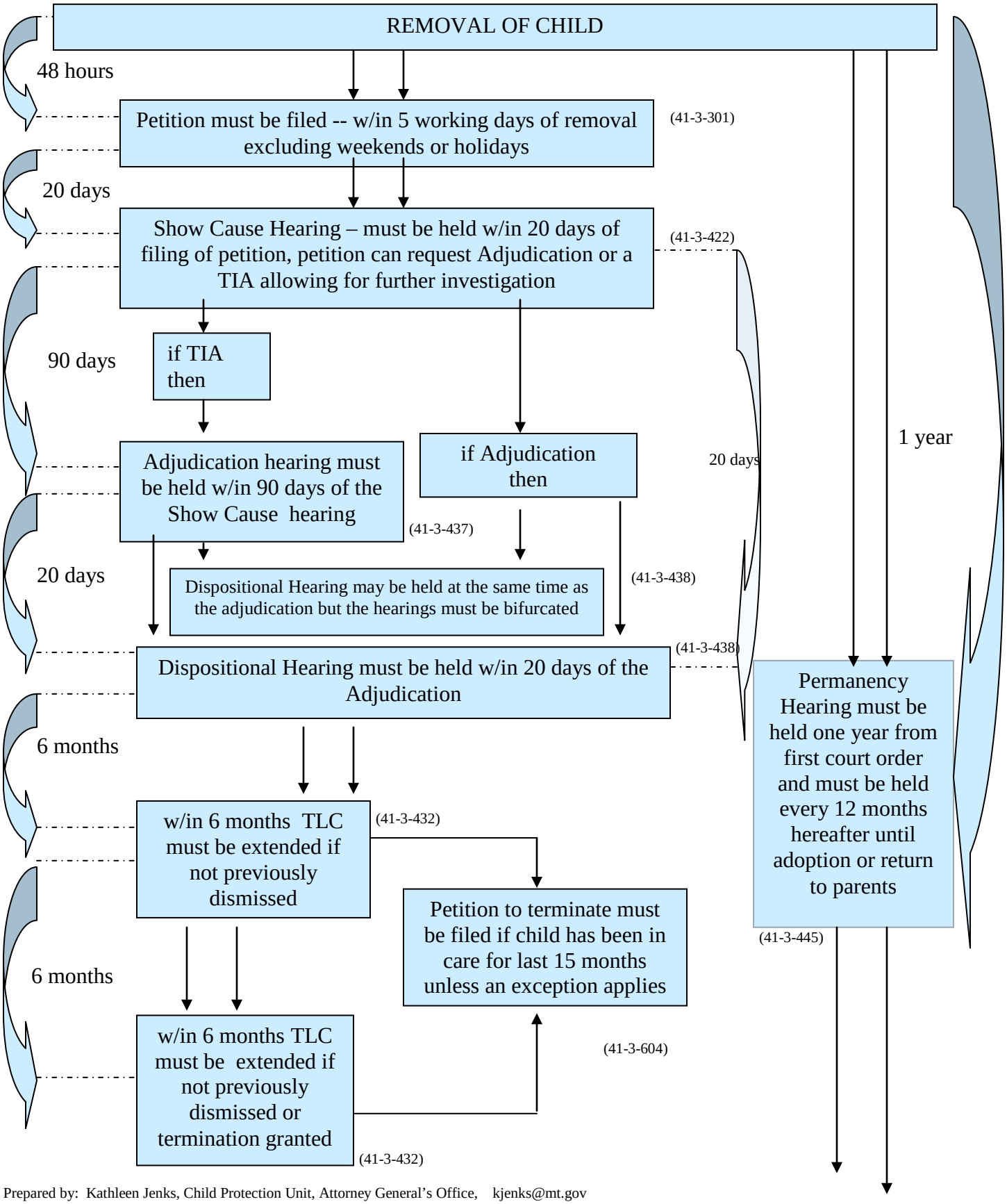
If, in the long run, you did not cooperate with the Department on the Service Treatment Agreement, you need to know that the potential exists down the road that the Department might file for termination of your rights as a parent. That is a possible outcome.

You need to know that your failure to cooperate with the Department, should we grant this Petition, might result in that termination Petition, and, of course, you would have the right to oppose it and bring your witnesses, and so on, but that is a potential outcome, and it is very serious. The Montana Supreme Court has ruled repeatedly that failure to comply with even one substantive requirement of a Service Treatment Agreement will support termination of parental rights.

After the Adjudicatory hearing, there will be a Dispositional hearing at which we will consider a report by the Guardian *ad litem* (explain GAL), what placement is appropriate for your child(ren), what services the Department intends to provide, and whether the Department should have temporary legal custody.

Simplified MCA Abuse and Neglect Timeline for Judicial Hearings

(this flowchart assumes that reasonable efforts are required and is pursuant to MCA 2007)



Prepared by: Kathleen Jenks, Child Protection Unit, Attorney General's Office, kjenks@mt.gov

YOUTH DETENTION HEARING

I. Rights of the Youth taken into Custody (§41-5-331 MCA):

1. MUST BE MET
   a. Youth must be advised of his/her rights against self-incrimination and right to counsel.
   b. Person assigned to give notice shall immediately notify the parents, guardian, or legal custodian or if cannot be found then a close relative or friend chosen by the youth must be notified.

2. Youth may waive the rights:
   a. When the youth is 16 or older.
   b. Youth is under 16 and the youth and parents or legal guardians disagree then can only waive with the advice of counsel.
   c. Youth under 16: youth and parents must agree.

II. Custody hearing for Probable Cause (PC) (§41-5-332 MCA)

1. If a youth is taken into custody for questioning, a hearing to determine whether there is probable cause to believe the youth is delinquent or in the need of intervention, then the hearing must be held within 24 hours, excluding weekends and legal holidays.
2. If youth is in custody for a violation of placement under a home arrest program, then a hearing to determine whether a violation occurred must happen within 24 hours.
3. When a PC hearing is required then it may be held by the youth court, a justice of the peace, a municipal or city judge, or magistrate, a record of the hearing must be made by a court reporter or by a tape recording.
4. A PC hearing may be conducted by phone if other means are impractical.
5. A hearing is not required for a youth placed in detention for an alleged parole violation.

III. Custody hearing for PC-Procedure (§41-5-333 MCA)

1. At a PC hearing the youth must be informed of his/her constitutional rights and rights under this chapter.
2. Parent, guardian, or custodian of the youth may be held in contempt of court for failing to be present at or to participate in the PC hearing unless the parent, guardian, or custodian:
   a) Cannot be located
   b) Is excused by the court for good cause.
3. At the PC hearing, a guardian *ad litem* may be appointed as provided in §41-5-1411 MCA

IV. Detention or Release (§41-5-334 MCA)

1. If the court determines that the youth should be placed in custody and meets the criteria in §41-5-341 - 343 MCA, then the youth may be placed in a detention facility, a youth assessment center, or a shelter care facility, but may not be placed in a jail or other facility used for the confinement of adults accused or convicted of criminal offenses.

2. If PC is not found or if a PC hearing is not held within time, then the youth must be immediately released from custody.

V. Criteria for Placement of Youth in Secure Detention Facilities (§41-5-341 MCA: ONLY IF:

1. Youth has allegedly committed an act that would be considered criminal if an adult and the alleged offense is one specified in 41-5-206 MCA.
2. Youth is alleged to be a delinquent youth and:
   a. Has escaped from correctional or secure detention facility.
   b. Has violated a valid court order or a prole agreement.
   c. The youth's detention is required to protect persons or property.
   d. Youth has pending court or administrative action or possibility of flight from jurisdiction of court.
   e. There are not adequate assurances that the youth will appear for court; or
   f. Youth meets additional criteria for secure detention established by the youth court.
3. Youth has been adjudicated delinquent and is awaiting final disposition of the youth's case.

VI. Criteria for Placement of Youth in Shelter Care Facility (§41-5-342 MCA): ONLY IF:

1. Not possible for youth to stay home.
2. Youth needs protection from physical or emotional harm.
3. To deter or prevent immediate repetitious troubling behavior.
4. Need to assess the youth and the youth's environment.
5. Need to provide adequate time for case planning and disposition.
6. Necessary to intervene in a crisis situation and provide intensive services or attention that might alleviate the problem and reunite the family.

VII. Criteria for Placement of Youth in Youth Assessment Center (§41-5-343 MCA): ONLY IF:

1. Youth meets requirement for shelter care.
2. Youth has not committed a felony offense if it were committed by an adult.
3. Youth needs an alternative, staff-secured site for evaluation and assessment of the youth's need for services.
4. Need for structured programming to make youth accountable for actions.
5. Youth meets qualification as outlined by the department and coordinated with the guidelines used by the youth placement committee.

WHEN DOES THE INDIAN CHILD WELFARE ACT APPLY?

THE INDIAN CHILD WELFARE ACT APPLIES WHEN:

- The proceedings are child custody proceedings as the ICWA defines that term 25 U.S.C. § 1903(1); **and**
- The child is an "Indian child" as the ICWA defines that term under 25 U.S.C. § 1903(4).

If the proceedings are not child custody proceedings, or the child does not meet the definition of Indian child, the ICWA does not apply.

THE FOLLOWING *ARE* "CHILD CUSTODY PROCEEDINGS" UNDER THE ICWA:

- Foster care placements – this includes any action where child is removed from its parent or Indian custodian for temporary placement in a home or institution, including guardianship and conservatorship, **and** where parent or custodian cannot have child returned upon demand but where parental rights have not been terminated. 25 U.S.C. § 1903(1)(i)
- Termination of parental rights. 25 U.S.C. § 1903(1)(ii)
- Pre-adoptive placements. 25 U.S.C. § 1903(1)(iii)
- Adoptive placements. 25 U.S.C. § 1903(1)(iv)

THE FOLLOWING ARE *NOT* "CHILD CUSTODY PROCEEDINGS" UNDER THE ICWA:

- An award of custody pursuant to a divorce where one of the parents will obtain custody of the child. 25 U.S.C. § 1903(1)
- A placement based upon an act which, if committed by an adult, would be deemed a crime. 25 U.S.C. § 1903(1)

CONSTRUCTION/APPLICATION

- A placement that meets the definition of foster care placement under the ICWA and results from an act that *would not* be deemed a crime if committed by an adult, such as a status offense, is a child custody proceeding under the ICWA.
- A child custody placement pursuant to a divorce *where someone other than one of the parents* will obtain custody of the child is also a child custody proceeding under the ICWA.

THE CHILD IS AN "INDIAN CHILD" UNDER THE ICWA IF:

- He or she is an unmarried person who is under the age of 18, and
- The child is a member of a federally recognized Indian tribe; **or**
- The child is the biological child of a member of a federally recognized Indian tribe **and** child is eligible for membership in any federally recognized Indian tribe. 25 U.S.C. § 1903(4)

DEFINITIONS UNDER THE ICWA:

- **"Extended family member:"** defined by the law or custom of the Indian child's tribe, or in the absence of such law or custom, is a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or step-parent. 25 U.S.C. § 1903(2)
- **"Indian:"** any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation. 25 U.S.C. § 1903(3) For purposes of the ICWA, tribes are arbiters of their own membership. (In The Interest of J.W., 498N.W.2d 417, 1993 Iowa App. Lexus 8)
- **"Indian child's tribe:"** the Indian tribe in which an Indian child is a member or eligible for membership, or in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. 25 U.S.C. § 1903(5)
- **"Indian custodian:"** any person who has legal custody of an Indian child under tribal law or custom or under State law; or to whom temporary physical care,

custody and control has been transferred by the parent of such child. 25 U.S.C. § 1903(6)

- **"Indian tribe:"** any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians. 25 U.S.C. § 1903(8)
- **"Qualified expert witness:"** although not defined under the ICWA, a House Report prepared in conjunction with the ICWA states that the phrase "is meant to apply to expertise beyond the normal social worker qualifications." H.R. No. 95-1386, 95th Cong., 2d Sess., reprinted in 6 U.S.C.C.S.A.N. 7530, 7454 (1978) In addition, the Bureau of Indian Affairs has promulgated "Guidelines for State Courts" which interpret the ICWA. The following characteristics are set forth at 44 Federal Register 67,593 (1979) as those most likely to qualify a witness as an expert under the ICWA:
  a) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices.
  b) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe.
  c) A professional person having substantial education and experience in the area of his or her specialty.

Thus, a "qualified expert witness" is not an *expert on the ICWA*, but an *expert on the child's tribe*.

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

IN THE MATTER OF _____, A Youth Under the Age of 18.	Cause No. DJ _____ Dept. No. _____ **JUVENILE ACKNOWLEDGMENT OF RIGHTS FOR DETENTION HEARING**

My true name is _____, and I am the youth in this cause. I fully understand this document because my attorney has explained it to me, and because I have read it or my attorney has read it to me.

During any probable cause or detention hearing, I understand I have the right to:

___ Be represented by an attorney and, if I cannot afford an attorney, have an attorney appointed for me. However, if I am found to be a delinquent youth or youth in need of intervention, I may have to pay the cost of my court-appointed attorney.
___ Remain silent—the State may not force me to testify and incriminate myself
___ Testify on my own behalf, but if I testify I may incriminate myself
___ Confront and cross-examine witnesses against me
___ Present witnesses and evidence on my behalf and compel the attendance of witnesses by subpoena at no cost to me
___ Confidentiality with regard to certain aspects of the proceedings
___ Request the Court appoint a guardian *ad litem* on my behalf if I have no parent or guardian appearing in these proceedings, or if the interests of my parent or guardian conflicts with my interests

The youth's parents or guardians understand they:

___ May be required to reimburse the state or local government for costs attributable to the adjudication, disposition, attorney fees for the costs of prosecuting or defending the youth, costs of detention, supervision, care, custody, and treatment of the youth
___ May be required to participate in counseling, treatment, or other support services
___ Are obligated to assist and support the Youth Court in implementing the Court's orders concerning the youth, and are subject to the Court's contempt powers if they fail to do so. The Youth Court personnel shall assist the parents to the extent possible in implementing and enforcing interventions and consequences designed to modify the youth's behavior

___ Have the right to review the results of a youth assessment and to place a rebuttal, statement, or additional information in the youth's Youth Court file.

DATED the ____ day of _____, 2003.

_____	_____
Parent/Legal Guardian	Parent/Legal Guardian
_____	_____
Youth	Other

I hereby certify that the above-named Youth has read this document, or I have read it to him or her, and the youth fully understands it.

_____
Attorney for Youth

JUVENILE ARRAIGNMENT

-- Verify youth's name.

-- Verify notice to and presence of both parents/guardian.

--Is youth under any disability?

-- Has written Acknowledgement of Rights been executed/filed? If so, verify. If not:

ADVISE YOUTH AND PARENTS/GUARDIAN OF RIGHTS:

1. Right to remain silent
2. Right to be represented by legal counsel

   [If no counsel has been retained and parents are unable to retain counsel, counsel must be appointed unless waived by youth <u>and</u> parents, PROVIDED that there may be no waiver if a DRS commitment for more than six months may result.]

3. Advise of contents of petition
4. Most severe dispositions: including extended jurisdiction sentence if applies
   a. probation restrictions
   b. commitment to DFS and removal from home
   c. if "serious juvenile offender" to a youth correctional facility
   d. restitution
   e. fine
   f. community service
   g. counseling
   h. medical or psychological evaluations
   i. home arrest
5. Right to admit/deny the charges
6. Presumption of innocence
7. Right to trial by jury [doesn't apply to YINS]
8. Public trial (if a felony)
9. Speedy trial
10. Confront and cross-examine witnesses
11. Right to present evidence
12. Right against self-incrimination
13. Right to issuance of subpoenas
14. Reasonable doubt
15. Unanimous jury verdict

DO YOU UNDERSTAND YOUR RIGHTS?

16. Additional time prior to entry of plea

BAIL

TENTH JUDICIAL DISTRICT COURT
E. WAYNE PHILLIPS, DISTRICT JUDGE

MENTAL COMMITMENT CHECKLIST*

Case No. DI-___- _____

Initial Appearance: Read rights in § 53-21-115, MCA
§ 53-21-116—118, MCA

Adjudicatory Hearing: § 53-21-126, MCA

1. ID those present:

State: _____

Court-Appointed Friend: _____

Court-Appointed Professional Person: _____

Others: _____

2. If the Respondent is **not present** (§ 53-21-119(2), MCA):

A. must be waived by the Attorney and Friend with concurrence by professional person;

B. find – the presence of the Respondent at the hearing would be likely to seriously adversely affect his mental condition;

C. find – an alternative location in surroundings familiar to the Respondent would not prevent such adverse effects on the Respondent's mental condition.

3. The Respondent has a right to have their hearing conducted in court and not in a mental health facility. *In the Matter of K.G.F.*, 2001 MT 140, ¶ 46, 306 Mont. 1, 29 P.3d 485. Therefore, if not held in a courtroom, either a waiver is required or a finding that familiar surroundings are necessary to prevent adverse effect on Respondent's mental condition. Section 53-21-119(2), MCA.

4. Witnesses:

State: _____

Respondent: _____

Findings:

_____ Based on reasonable medical certainty, Respondent suffers from mental disorder.

_____ Find commitment is necessary based on the following criteria, § 53-21-126:

(a) The Respondent, because of the mental disorder, is substantially unable to provide for:
____ own basic needs ____clothing ____shelter ____health ____ safety

(b) The Respondent has recently, because of the mental disorder and through an act
____ caused self-injury ____ caused injury to others

(c) Because of the mental disorder
____ there is imminent threat of injury to the Respondent
____ there is imminent threat of injury to others

NOTE: It appears from *K.G.F.* that, despite the statute's use of the term "consider", you must find imminent threat of injury to self or others.

OR

(d) The Respondent's mental disorder

____ has resulted in recent acts, omissions or behaviors that create difficulty in protecting the Respondent's health or life;

____ is treatable, with a reasonable prospect of success;

____ has resulted in the Respondent's refusing or being unable to consent to voluntary admission for treatment

____ will, if untreated, predictably result in deterioration of the Respondent's mental condition to the point at which the Respondent will become a danger to self or to others or will be unable to provide for the Respondent's own basic needs of food, clothing, shelter, health or safety. Predictability may be established by Respondent's relevant medical history.

NOTE: If you use (d) to determine commitment necessary, may only commit to community facility. Section 53-21-127(7), MCA.

Recess.

Adjourn Adjudicatory and proceed to Dispositional pursuant to MCA Section 53-21-127, if no objection from counsel.

1. Witnesses:

_____

_____

_____

_____

_____

_____

2. Incorporate by reference that statement of facts which court used to determine that the Respondent suffers from a mental disorder and requires commitment:

   A. Which less restrictive alternatives have been considered?

   B. Which alternatives to treatment have been considered?

   C. Why those alternatives are unsuitable.

3. Commit the Respondent to _____ for a period of not more than 3 months (6 months or a year on recommitments).

4. Find the Respondent meets the admission criteria of the center.

5. Find the center authorizes the Respondent's admission.

6. Hold the court authorizes the chief medical officer of the center or physician designated to administer appropriate medication involuntarily if necessary to protect the Respondent, to protect the public and to facilitate effective treatment. The medication may not be involuntarily administered unless the chief medical officer or physician approves it.

* The author has done his best to conform the details of this Mental Commitment Checklist with current statutory provisions and with *K.G.F.*, 2001 MT 140, 306 Mont 1, 29 P.3d 485. *K.G.F.* is necessary reading for any involuntary mental commitment. That *K.G.F.* requires a "knowing" waiver of the right to a jury trial and selection of an attorney and several other matters by a mentally ill person is incomprehensible, but it is the law.

PERMANENCY HEARING CHECKLIST

JUDGE: _____ **CODER:** _____

JURISDICTION: _____ **CASE #:** _____

DATE OF HEARING: ____/____/____ Scheduled date (if different from hearing date): ____/____/____

START TIME: _____AM PM END TIME: _____ AM PM Scheduled start time _____AM PM

Was the hearing interrupted to address non-case related matters? YES NO
If yes, explain:_____

Was the hearing continued? YES NO
Reason for Continuance: _____

Is the child removed from the home: YES NO DK
if yes, date of removal:____/____/____
Current placement: ❑ Relative/Kin ❑ Foster Care ❑ DK
❑ Other:_____

WHICH OF THE FOLLOWING PERSONS WERE PRESENT AT THE HEARING?

- ❑ Judge or Judicial Officer
- ❑ Attorney for Agency/Department
- Attorney for Parents
  - ❑ Same for Both
  - ❑ Mother
  - ❑ Father
- ❑ Representative for Child
- ❑ Assigned Caseworker
- ❑ Representative for Caseworker
- ❑ Court Reporter or equivalent
- ❑ Court Security
- ❑ Judicial case management staff
- ❑ Biological Mother
- ❑ Putative Father(s)
  - If more than one, how many: _____
- ❑ Foster Parent
- ❑ Child(ren)
  - Age(s): _____
- ❑ Others (Specify):

_____
_____
_____
_____

IF PARTY IS NOT REPRESENTED BY COUNSEL: ❑ INAP

Party not represented: ❑ Mother ❑ Father 1 ❑ Father 2 ❑ Child(ren)

Did the court advise the party of his or her right to counsel, including the right to court-appointed counsel, where applicable? YES NO DK

Did the party complete the eligibility form for court-appointed counsel? YES NO DK

Did the court provide information for how to obtain counsel? YES NO DK

PRESENCE/NOTICE OF PARTIES: ❑ INAP

Did the court inquire about parties who are *not* present? YES NO

If parties are not present, did the court require an explanation from the agency as to efforts to locate missing parties? YES NO

Efforts: _____

Was notice provided to parties? YES NO DK

REPORTS SUBMITTED DURING HEARING:

Were reports submitted provided to all parties prior to hearing? YES NO DK

Report: _____ DK Submitted By: _____ DK
Report: _____ DK Submitted By: _____ DK
Report: _____ DK Submitted By: _____ DK
Report: _____ DK Submitted By: _____ DK
Report: _____ DK Submitted By: _____ DK

Comments:

TESTIMONY:

Who testified with respect to petition/allegations (Check all that apply):

- ❑ Attorney for Agency/Department
- Attorney for Parents
  - ❑ Same for Both
  - ❑ Mother
  - ❑ Father
- ❑ Representative for Child
- ❑ Assigned Caseworker
- ❑ Representative for Caseworker
- ❑ Biological Mother
- ❑ Putative Father(s)
- ❑ Foster Parent
- ❑ Child(ren)
  - Age(s): _____
- ❑ Others (Specify): _____
  _____
  _____

SERVICES:

Did the court order the agency to obtain any additional reports or assessments? YES NO

Psychological Evaluation:	❑ Child	❑ Mother	❑ Father
Drug Screening/ Assessment:	❑ Child	❑ Mother	❑ Father
Health/Medical Records:	❑ Child	❑ Mother	❑ Father
School Records	❑ Child		
Other: _____			

Did the court order services for parent(s) or child(ren)? YES NO

Protective Supervision	❑ Child	❑ Mother	❑ Father
Drug/Alcohol Counseling	❑ Child	❑ Mother	❑ Father
Counseling (indiv/family)	❑ Child	❑ Mother	❑ Father
Parenting Skills	❑ Child	❑ Mother	❑ Father
Other: _____	❑ Child	❑ Mother	❑ Father
Other: _____	❑ Child	❑ Mother	❑ Father

VISITATION:

Did the court inquire about the terms and conditions of parent-child visitation? YES NO

Did the court make an initial decision regarding (check all that apply):

❑frequency of visits ❑ duration of visits ❑ supervised/unsupervised

OTHER COURT INQUIRIES:

- ❑ outstanding restraining orders
- ❑ paternity
- ❑ ICWA
- ❑ sibling placement
- ❑ financial support of child(ren)
- ❑ possible relative placement
- ❑ ICPC
- ❑ _____
- ❑ _____

ENGAGEMENT OF PARTIES:

Did the court explain the hearing process to the parents? YES NO

Did the court explain its role as an impartial decision-maker? YES NO

Did the court explain the legal time constraints on the case if the child has been removed (e.g,. one year to permanency hearing; ASFA)? YES NO

Did the court directly question the parent(s)? YES NO

Did the court provide the parent(s) with an opportunity to speak or ask questions? YES NO

PERMANENT PLAN FOR CHILD(REN):

- ❑ reunification
- ❑ TPR/adoption
- ❑ guardianship
- ❑ relative placement
- ❑ concurrent plan discussed
- ❑Not Stated in hearing

FINDINGS:

Did the court find whether the child could be safely returned home/remain in the home? YES NO

- ❑ reasonable efforts made to prevent removal
- ❑ no reasonable efforts necessary
- ❑ contrary to welfare of the child to remain in home
- ❑ _____

ORDERS AND SCHEDULING:

Continued previous court orders	YES	NO	DK
Was a copy of orders provided to parties at conclusion of hearing?	YES	NO	DK
Did the court set a date and time for the next hearing?	YES	NO	

Comments:

PRELIMINARY PROTECTIVE HEARING CHECKLIST

JUDGE: _____ **CODER:** _____

JURISDICTION: _____ **CASE #:** _____

DATE OF HEARING: ____/____/____ Scheduled date (if different from hearing date): ____/____/____

START TIME: _____AM PM END TIME: _____ AM PM Scheduled start time _____AM PM

Was the hearing interrupted to address non-case related matters? YES NO
If yes, explain:_____

Was the hearing continued? YES NO
Reason for Continuance: _____

Was the child removed from the home: YES NO DK
if yes, date of removal:____/____/____
Current placement: ❑ Relative/Kin ❑ Foster Care ❑ DK
❑ Other:_____

Was the sworn petition filed *prior to* the time of the hearing? YES NO DK

WHICH OF THE FOLLOWING PERSONS WERE PRESENT AT THE HEARING?

- ❑ Judge or Judicial Officer
- ❑ Attorney for Agency/Department
- Attorney for Parents
  - ❑ Same for Both
  - ❑ Mother
  - ❑ Father
- ❑ Representative for Child
- ❑ Assigned Caseworker
- ❑ Representative for Caseworker
- ❑ Court Reporter or equivalent
- ❑ Court Security
- ❑ Judicial case management staff
- ❑ Biological Mother
- ❑ Putative Father(s)
  - If more than one, how many: _____
- ❑ Foster Parent
- ❑ Child(ren)
  - Age(s): _____
- ❑ Others (Specify):

_____
_____
_____
_____

IF PARTY IS NOT REPRESENTED BY COUNSEL: ❑ INAP

Party not represented: ❑ Mother ❑ Father 1 ❑ Father 2 ❑ Child(ren)

Did the court advise the party of his or her right to counsel, including the right to court-appointed counsel, where applicable? YES NO DK

Did the party complete the eligibility form for court-appointed counsel? YES NO DK

Did the court provide information for how to obtain counsel? YES NO DK

PRESENCE/NOTICE OF PARTIES: ❑ INAP

Did the court inquire about parties who are *not* present? YES NO

If parties are not present, did the court require an explanation from the agency as to efforts to locate missing parties? YES NO

Efforts: _____

Was notice provided to parties? YES NO DK

Comments:

TESTIMONY:

Who testified with respect to petition/allegations (Check all that apply):

- ❑ Attorney for Agency/Department
- Attorney for Parents
  - ❑ Same for Both
  - ❑ Mother
  - ❑ Father
- ❑ Representative for Child
- ❑ Assigned Caseworker
- ❑ Representative for Caseworker
- ❑ Biological Mother
- ❑ Putative Father(s)
- ❑ Foster Parent
- ❑ Child(ren)
  - Age(s): _____
- ❑ Others (Specify): _____
  _____
  _____

SERVICES:

Did the court order the agency to obtain any additional reports or assessments? YES NO

Psychological Evaluation:	❑ Child	❑ Mother	❑ Father
Drug Screening/ Assessment:	❑ Child	❑ Mother	❑ Father
Health/Medical Records:	❑ Child	❑ Mother	❑ Father
School Records	❑ Child		
Other:_____			

Did the court order services for parent(s) or child(ren)? YES NO

Protective Supervision	❑ Child	❑ Mother	❑ Father
Drug/Alcohol Counseling	❑ Child	❑ Mother	❑ Father
Counseling (indiv/family)	❑ Child	❑ Mother	❑ Father
Parenting Skills	❑ Child	❑ Mother	❑ Father
Other:_____	❑ Child	❑ Mother	❑ Father
Other:_____	❑ Child	❑ Mother	❑ Father

VISITATION:

Did the court inquire about the terms and conditions of parent-child visitation? YES NO

Did the court make an initial decision regarding (check all that apply):

❑frequency of visits ❑ duration of visits ❑ supervised/unsupervised

OTHER COURT INQUIRIES:

- ❑ outstanding restraining orders
- ❑ paternity
- ❑ ICWA
- ❑ sibling placement
- ❑ financial support of child(ren)
- ❑ possible relative placement
- ❑ ICPC
- ❑ _____
- ❑ _____

ENGAGEMENT OF PARTIES:

Did the court explain the hearing process to the parents? YES NO

Did the court explain its role as an impartial decision-maker? YES NO

Did the court explain the legal time constraints on the case if the child has been removed (e.g,. one year to permanency hearing; ASFA)? YES NO

Did the court directly question the parent(s)? YES NO

Did the court provide the parent(s) with an opportunity to speak or ask questions? YES NO

FINDINGS:

Did the court find whether the child could be safely returned home/remain in the home? YES NO

- ❑ reasonable efforts made to prevent removal
- ❑ no reasonable efforts necessary
- ❑ contrary to welfare of the child to remain in home
- ❑ _____

ORDERS AND SCHEDULING:

Was a copy of orders provided to parties at conclusion of hearing? YES NO DK

Did the court set a date and time for the next hearing? YES NO

Comments:

POSTCONVICTION RELIEF
Section 46-21-101-105 MCA

Eligibility: Postconviction Relief: Challenge the legality of the conviction or sentence which couldn't be raised on appeal; outside trial record; not known at trial.

Habeas Corpus: If challenge legality of confinement for reasons unrelated to the legality of the conviction/sentence [e.g. good time calculations, pre-conviction confinement, etc.].

Appeal: If appeal is adequate, postconviction petition is premature.

Documentation:

1. Verified petition or affidavit.

2. The petition must: Section 46-21-104(1) and (2) MCA

   a) Identify the proceeding convicted by, give date of final judgment, set forth the alleged violations.

   b) Identify any other proceedings undertaken to secure relief.

   c) Identify all supporting facts and have attached affidavits, records, etc. to establish facts.

   d) Be accompanied by supporting memorandum.

   e) Petition may be amended only once. Section 46-21-105(1)(a).

3. Petitions which do not meet there requirements may be dismissed *sua sponte* or upon motion for failure to state a claim.

Procedure: 1. *Sua sponte* review of procedural requirements.

2. Order directing petition to be served upon Co. Attorney & Attorney General and directing them to file a response (or direct the Clerk of Court or Petitioner to serve petition).

3. After State filing Court must decide to dismiss or proceed.

4. If State files motion to dismiss or for summary judgment the Court may allow petitioner to file a responsive pleading in accord with M.R.C.P.

Burden of Proof: 1. Petitioner's burden.
2. Preponderance of evidence.

Appointment of Counsel: Only if a hearing will be held or if the interests of justice require (may be a good idea to appoint an attorney when prisoner files so many documents that an attorney will reduce flow of documents). Once attorney is appointed petitioner may not file documents *pro se*.

Statute of Limitations: 1) One year from date conviction is final if conviction after 4/24/96. Section 46-21-101 MCA or 2) Five years from date conviction is final if conviction before 4/24/96. No tolling unless "fundamental miscarriage of justice." See 46-21-101 *et seq.* MCA

MONTANA TWENTHIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

STATE OF MONTANA, Plaintiff, vs. _____ Defendant	Case No.: DC-04-___ REVOCATION ACKNOWLEDGMENT OF RIGHTS

I, the Defendant in the above-entitled cause, have read this document or my lawyer has read the document to me. I fully understand what it says.

BIOGRAPHICAL INFORMATION

I make the following statements about myself:

1. My true name is _____.

2. My date of birth is _____ and I am _____ years of age.

3. My Social Security Number is _____.

4. My mailing address is _____.

5. My telephone number is _____.

6. I CAN / CANNOT read the English language.

7. I CAN / CANNOT write the English language.

8. I have _____ years of formal education.

9. I am currently on probation or parole for
_____ in _____.
(Offense) (Jurisdiction)

10. I HAVE / HAVE NOT been treated for mental illness.
(List when and where if you have been treated for mental illness)
_____

Defendant's initials _____

POSSIBLE PUNISHMENTS

My attorney has explained to me and advised me of the following, and I fully understand that:

1. I am on probation and a Petition to Revoke has been filed for the following offense(s):
Count I _____
Count II _____
Count III _____
Count IV _____

2. The Maximum possible punishment I am subject to for the above-named offense(s) is:
Count I _____
Count II _____
Count III _____
Count IV _____

3. Considering the sentence(s) I originally received on the above charge(s), the Maximum sentence(s) the Court could impose if my sentence(s) were revoked is:

_____

4. If my sentence is revoked, I understand that it is possible for the sentencing Judge to order that I serve any prison time without the possibility of parole or furlough and the Court may place restrictions on my eligibility for parole as well as requirements to be performed during parole.

5. If my sentence is revoked, I understand that the Judge shall consider any elapsed time since I was last sentenced on the above charge(s) and either expressly allow all or a part of the time as a credit against the sentence or reject all or a part of the time as a credit.

REVOCATION HEARING AND RIGHTS

1. I understand that I have the right to a hearing in front of a judge on the petition to revoke.

2. I understand that I do not have the right to a jury at the hearing on the petition to revoke.

3. I understand that I have the right to deny any or all of the allegations that I violated the conditions of my probation.

4. I understand that the state has the burden of proving by a preponderance of evidence that I violated one or more of the conditions of my probation.

Defendant's initials _____

5. I understand that if the state proves to the court that I violated one or more of the condition(s) of my probation, the judge can revoke my current sentence and impose up to the maximum sentence(s) recited above.

6. I understand that if I admit one or more of the alleged violations of my probation such admission has the same effect as if the state had proven the violations, namely, the judge can revoke my current sentence and impose up to the maximum sentence(s) recited above.

7. I understand that I have the right to be represented by an attorney at every stage of these proceedings, and if I cannot afford an attorney, to have one appointed to represent me at no initial expense to me, provided that in the event I admit one or more of the alleged violations or the court finds that I violated one or more of the conditions of my probation, the court may order that I pay the cost of my court appointed attorney if I am financially able to do so.

8. I understand that I have the right to effective assistance of counsel.

9. I understand that I have the right to remain silent and the State may not force me to testify or in any way incriminate myself.

10. I understand that I have the right to testify on my own behalf, but if I do, I risk incriminating myself.

11. I understand that I have the right to appeal any conviction on these offenses.

12. I understand that I have the right to confront and cross-examine witnesses against me.

13. I understand that I have the right to present witnesses and evidence on my behalf and I can compel the attendance of these witnesses by the use of subpoena at no cost to myself, provided that in the event I admit one or more of the alleged violations of my probation or am found to have violated one or more conditions of my probation by the court, the Court may order that I have to pay the cost of my prosecution, including witness fees, if I am financially able to do so.

14. I understand that I can waive a hearing on the petition to revoke and voluntarily admit one or more of the alleged violations of my probation.

By signing below I acknowledge that I have received a copy of the petition to revoke, report of violation, and this document and have reviewed each with my attorney.

Dated this _____ day of _____, 2004.

_____
Defendant

I certify that the above-named Defendant has read the above document or that I have read it to the Defendant. The Defendant and I have fully discussed Defendant's legal rights and the procedure followed in a revocation proceeding.

Dated this _____ day of _____, 2004.

_____
Attorney for Defendant

SENTENCING CHECKLIST

1. Review Plea Agreement and decision to accept or reject it. §46-12-211

2. Any changes or corrections to PSI?

3. Any witnesses for the State?
   State's recommendation for sentencing.

4. Any witnesses for the Defendant?
   Defendant's recommendation for sentencing.

5. Statement from the Defendant.

6. Is either party aware of any reason sentence should not now be imposed?

7. Review PSI
   * State charges for sentencing
   * Found guilty by trial or plea
   * Pretrial incarceration
   * Court appointed or retained counsel
   * Age
   * Education
   * Occupation
   * Marital status / children
   * Assets
   * Juvenile criminal history
   * Adult criminal history
   * Nature of crime/instant offenses
   * Defendants & victims statements
   * Restitution owed
   * Alcohol/chemical use
   * Family background
   * Motivation to reform

8. Follow PSI, State's or Defendant's recommendations

9. Go to Form of Sentences

10. Mandatory minimums (§46-18-205) & exceptions (§46-18-222)

11. Additional sentence -- dangerous weapon (§46-18-221)

12. Non-violent offenders - imprisonment - §46-18-225.

13. Fines and payment of costs. §46-18-231 & -232.

14. Restitution - §§46-18-241 to -243

15. Credit for incarceration before conviction §46-18-403; *State v. Fisher*, 314 Mont. 222

16. PSI Conditions 1-XXX are imposed.

17. Enroll in chemical dependency program within (90) days.

18. See APO before leaving Court today.

19. Any bail is discharged and surety bond posted is exonerated.

Suggested Text for Clarifying the Interpreter's Role to the Witness

I want you to understand the role of the interpreter. The interpreter is here only to interpret the questions that you are asked and to interpret your answers. The interpreter will say only what we you say and will not add, omit, or summarize anything.

The interpreter will say in English everything you say in your language, so do not say anything you do not want everyone to hear.

If you do not understand a question that was asked request clarification from the person who asked it. Do not ask the interpreter.

Remember that you are giving testimony to this court, not to the interpreter. Therefore, please speak directly to the attorney or me, not to the interpreter. Do no ask the interpreter for advice.

Please speak in a loud, clear voice so that everyone and not just the interpreter can hear.

If you do not understand the interpreter, please tell me. If you need the interpreter to repeat something you missed, you may do so, but please make your request to the person speaking, not to the interpreter.

Finally, please wait until the entire question has been interpreted in your language before you answer.

Do you have any questions about the role of the interpreter? Do you understand the interpreter?

*Note that the interpreter is simultaneously interpreting this advisement while the judge is speaking, and therefore the witness has an opportunity to recognize any problems with communication.

INTERPRETER'S OATH

Do you solemnly swear or affirm that you will interpret from _____ to _____ accurately, completely and impartially, using your best skill and judgment in accordance with the standards prescribed by law and the code of ethics for legal interpreters; that you will follow all official guidelines established by this court for legal interpreting or translating, and discharge all of the solemn duties and obligations of legal interpretation and translation?

Suggested Text for Clarifying the Interpreter's Role to the Jury

Proceedings interpreting:

In this case the (plaintiff)(defendant)(witness) is unable to communicate readily in English. The court has appointed a neutral (certified and) qualified interpreter in this case, and has been given an oath to interpret everything faithfully to the best of the interpreter's ability.

This court seeks a fair trial for all regardless of the language they speak and regardless of how well they may or may not speak English. Bias against or for persons who have little or no proficiency in English because they do not speak English is not allowed. Therefore, do no allow the fact that the party requires and interpreter to influence you in any way.

Witness interpreting:

Treat the interpretation of the witness's testimony as if the witness had spoken English and no interpreter were present. Do not allow the fact that testimony is given in a language other than English to affect your view of [her] credibility.

If any of you understand the language of the witness, disregard completely what the witness says in [her] language. Consider as evidence only what is provided by the interpreter in English. Even if you think an interpreter has made a mistake, you must ignore it completely and make your deliberations on the basis of the official interpretation.